TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED ST

OCTOBER TERM, 1[illegible]

No. [illegible] 74

[illegible] ANCHISON, TOPEKA & SANTA FE RAILWA
COMPANY, PLAINTIFF IN ERROR,

vs.

CLAUDE SWAFFORD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT O
FOR THE FIFTH CIRCUIT.

FILED FEBRUARY 13, 1894.

(24,065)

(24,065)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 370.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CLAUDE SWEARINGEN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1914.

a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1913, at Fort Worth, Texas, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
versus
CLAUDE SWEARINGEN, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 19th day of December, A. D. 1912, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Western District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2453, as follows:

b *Transcript of Record.*

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2453.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., Plaintiff in Error,
vs.
CLAUDE SWEARINGEN, Defendant in Error.

Error to the District Court of the United States for the Western District of Texas, El Paso Division.

U. S. Circuit Court of Appeals. Filed Dec. 19, 1912. Frank H. Mortimer, Clerk.

1 *Transcript.*

In the United States District Court for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY.

Caption.

THE UNITED STATES OF AMERICA,
Western District of Texas:

Be it remembered, That there was opened and begun to be holden a Special Term of the United States District Court for the Western District of Texas, at El Paso, Texas, on the 23rd day of September, A. D. 1912, pursuant to law and an order of the Honorable T. S. Maxey, United States District Judge for said District:

Present: The Honorable T. S. Maxey, United States District Judge; Hon. Charles A. Boynton, United States District Attorney; Eugene Nolte, United States Marshal, and D. H. Hart, Clerk of said Court.

When and where the following proceedings, among others, were had, to-wit:

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Plaintiff's First Amended Original Petition.

2 In the District Court of the United States in and for the Western District of Texas, at El Paso, Texas, October Term, A. D. 1912.

No. 352.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

To the Honorable T. S. Maxey, Judge of said Court:

Comes now your petitioner, Claude Swearingen, hereinafter styled plaintiff, and leave having been had and obtained, files this his First Amended Original Petition, in lieu of his Original Petition hereto-

fore filed, and complaining of the Atchison, Topeka and Santa Fe Railway Company, hereinafter styled defendant, says:

That plaintiff is a resident and citizen of the State of Texas, and that defendant is a corporation, duly incorporated under the laws of the State of Kansas, and is a citizen of the State of Kansas, and doing business and running trains into El Paso County, Texas, and within the jurisdiction of this Court, and all parties being in Court, for cause of action herein plaintiff says:

That defendant on the twentieth day of December, A. D. 1910, owned and operated in the County of El Paso, Texas, a system of railroads and propelled cars by means of steam, and was a common carrier for hire; that the defendant also owned and operated the same system of railroads in the State of Colorado and propelled cars by means of steam, and was a common carrier of freight and passengers for hire, and was engaged in Interstate Commerce. Plaintiff says that on said date he was employed by the defendant as locomotive fireman in the State of Colorado on an Interstate Commerce train. Plaintiff says that on said date while he was working in the capacity of locomotive fireman for the defendant, defendant negligently had an engine failure of the engine on which plaintiff was firing, and that the engine he was on was picked up by another train; that instead of putting the engine that he was on near the front end of the train, where it could be handled carefully
3 and easily, it was negligently put near the back end of the train, where any stopping and starting of the train would cause the engine to stop with a jerk or to start with a jerk, owing to the fact that the engine was so much heavier than freight cars and its momentum controlled with greater difficulty.

Plaintiff says that when he was on the road he was under the orders and instructions of his engineer, and when the engine was picked up by this other train he was instructed by his engineer to remain on the engine and look after the engine, and take care of same until it reached the terminal; that he was instructed by said engineer that whenever the train began to slow down preparatory to stopping, for him to get out on the pilot with an oil can in order to oil the cylinders through the release plugs just before stopping, or be prepared to oil the cylinders through the indicator plug holes as soon as the train came to a stop; that his said engineer instructed him to be on the pilot before the engine had stopped, in order to oil the release valves of same as the engine slowed down, and the length of the stop at any place could not be foreseen, and that he should oil both cylinders and valves each time the train stopped, in order to avoid damaging the cylinders and valves by same running dry, and cutting. And said engineer, after giving plaintiff said instructions left said engine to plaintiff's exclusive care and went to the terminal on a passenger train.

Plaintiff says that when they pulled into Castle Rock, Colorado, the train he was on was heading into the side track there and, according to instructions received from his said engineer, he went out on the front end of the engine and got down on the pilot sill step, so as to be ready to oil the cylinders, and at this time he had been

continuously on duty as fireman on said engine for seventeen hours and forty-five minutes. Plaintiff further says that the pilot sill step on said engine was too low, and that same was too narrow, to-wit: that it was about three and one-half inches wide, and that said sill step was inside of the rail instead of being outside of the rail, and that the cinders on the side track between the switches at Castle Rock were too high and not levelled down below the height of the sill step on the pilot of his locomotive, and that while the train was pulling into said side track the sill step caught a pile of cinders because the cinders were too high and the sill step too low, and piled
4 cinders up on the sill step, making the said sill step unsafe for a footing.

Plaintiff says that after stepping down on said sill step, and while he was holding on and in the exercise of ordinary care, the engineer handling the train and trying to stop same allowed the slack to run into the train with an unusual jerk, and owing to the fact that the sill step on the pilot was inside of the rails instead of outside of the rails, and that it was too low, and the cinders on the track too high, and that cinders had been caught by the sill step and lay thereon, and that the plaintiff had then and there been on duty seventeen hours and forty-five minutes, he being tired and worn out, and that the train was jerked with unusual force and suddenness, plaintiff was thrown off the pilot sill step on the rails in front of his locomotive. That the pilot passed over his left leg, the same being so low and close to the rail that he was not able to get his leg from under the pilot, and the engine passed over his leg, which crushed and mangled same so badly that it was necessary to amputate it about six inches below the knee.

The plaintiff says that said injuries were received by him through the negligence of the defendant, in this, that the defendant through its agents and employees handled the train in a negligent and rough manner, as aforesaid, which threw plaintiff off the pilot sill step and caused his injuries. Plaintiff says that the defendant was further negligent in having the pilot sill step too low and the cinders between the rails too high and in allowing cinders to be caught on the pilot sill step, which gave plaintiff no foot-hold; that the defendant was negligent in this, because they failed to provide plaintiff a safe place in which to work, to-wit: provided plaintiff a defective and dangerous step on which to stand, same being too narrow and inside the rails. Plaintiff says that defendant was further negligent in not having the sill step more than about three and one-half inches wide, and that the defendant was further negligent in not having the sill step outside of the rails instead of inside of the rails. Plaintiff says that the defendant was negligent through its servants and employees also in this, in putting his engine near the back end of the train instead of near the front end of the train where it could have been handled easily and smoothly without a jerk. Plaintiff says that the defendant was further negligent in permitting
5 and requiring him to remain on duty seventeen hours and forty-five minutes, and more than sixteen hours, instead of relieving him at the end of sixteen hours, and plaintiff says each and all said acts and omissions on defendant's part above described

constituted negligence and caused and contributed to his said injury.

Plaintiff says that before starting out on said trip he did not get his required number of hours' rest before going out; that he was in the terminal long enough to have had his rest, but when he had only had two or three hours' rest the defendant notified him to report to the train master's office for an investigation in some matters pertaining to some of the employees of the company, and he was required to stay before defendant's Investigating Committee three or four hours, and then, without giving plaintiff the number of hours of rest to which he was legally entitled before going out again on the trip on which he was injured he was again required to go on duty as fireman and remained continuously on duty for seventeen hours and forty-five minutes, until he was injured, all as above described, and in this failure to give plaintiff the period of rest required by law before sending plaintiff on the trip on which he was injured, and in requiring plaintiff to go out on his said last trip without his having had his legal rest, defendant was guilty of negligence contributing to and causing his said injury.

Plaintiff says that he is twenty-nine years of age, and that before said injury he was a man of good health and unimpaired physical strength and vitality; that he was before said injury engaged in the occupation of locomotive fireman and had been trained in said capacity, was able to and did earn the sum of One Hundred and Twenty-five Dollars per month. Plaintiff says that by reason of his said injuries he will hereafter be unable to pursue his chosen occupation as locomotive fireman; that he will be unable to earn any money in that or any other capacity, as he is uneducated and disqualified from following any other occupation or vocation because his left leg is gone, and he cannot walk from place to place and do manual labor. Plaintiff says that owing to said injury he has suffered excruciating pain of body and mind, and will continue to suffer such pain, and that his injuries are permanent. Plaintiff says that by reason of said injuries and results therefrom he has been damaged in the aggregate sum of Forty Thousand Dollars ($40,000.00).

6 Premises considered and all parties being in court, Plaintiff prays that upon final hearing herein he have judgment against the defendant in the sum of Forty Thousand Dollars, and for all his costs and for such other general and special relief as he may be entitled to in equity and law, and he will ever pray.

ENGELKING & JOHNSON,
Attorneys for Plaintiff.

Indorsed: No. 352, in U. S. District Court, El Paso, Texas, Western District. Claude Swearingen vs. A., T. & S. F. Ry. Co. Plaintiff's First Amended Original Petition. Filed Sept. 25th, 1912. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

First Amended Answer.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352.

CLAUD SWEARINGEN, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Comes now the defendant, and leave of Court first had, files this, its first amended answer, amending its original answer heretofore filed in this cause, and for such amendment defendant says:

Comes now the defendant by its attorneys, and demurring to plaintiff's petition herein filed, says that the same is insufficient in law; wherefore, defendant prays the judgment of the court.

TURNEY & BURGES,
Attorneys for Defendant.

For answer comes now said defendant and says that it denies, all and singular, the allegations in plaintiff's petition contained; wherefore, it prays the judgment of the court and puts itself upon the country.

TURNEY & BURGES,
Attorneys for Defendant.

For further and special answer comes now said defendant and says that if plaintiff was injured at the time and place alleged by
7 him, then such injury was occasioned by plaintiff's own contributory negligence in attempting, while the engine mentioned by him was in motion, to go upon the pilot or step thereof for the purpose of oiling said engine or otherwise, or in attempting, while said engine was in motion, to go thereon, or about the same, and in not waiting until said engine stopped or came to a standstill before attempting to oil either the said engine or any part thereof, or to do any other thing which he claims he was attempting to do, and that because of such contributory negligence, in no part of which defendant concurred, plaintiff cannot recover.

For further answer defendant says that if plaintiff was injured at the time and place alleged by him, then and in that event, plaintiff cannot recover anything of this defendant for that plaintiff himself assumed the dangers and injuries consequent to and growing out of the acts and things done by the plaintiff in attempting, while an engine was in motion, to climb over the same or about the same and to attempt to oil some part thereof while in motion when said plaintiff was not called upon to do so, nor was he called upon to go into a place of danger for the purpose of oiling said engine while in motion or to go into said place of danger at all, and in so doing and in doing the

things which he did do at the time and place alleged by plaintiff, he thereby assumed the dangers and injuries incident to his own acts and having so assumed them, without any wrong or negligence on the part of the defendant, which did not exist, the plaintiff cannot recover.

Wherefore, defendant prays the judgment of the court and puts itself upon the country.

TURNEY & BURGES,
Attorneys for Defendant.

And further specially answering, said defendant says that it is not true that plaintiff was injured because of working over time, for that plaintiff did not work over time nor was he engaged in the service as fireman when he was so injured, if injured at all; and defendant says that if said engine upon which plaintiff was riding was delayed, then the defendant is not liable for such delay for that such delay was occasioned by a casualty to the engine, to-wit: the sudden breaking of the valve yoke on the inside of the steam chest and from causes not known to the defendant or any part of its servants or employes at the time said engine left the terminal or the beginning point of
8 said run or journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by the defendant, its agents or servants, in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question, by the use of reasonable diligence, and was not, in fact, known by the defendant or any of its servants, agents or employees; that said delay of said engine, if there were any such delay, was occasioned as a result of a cause not known to the defendant, its agents, servants and employes, when the said engine left the terminal, and which cause could not have been foreseen by the use of reasonable care and caution.

Wherefore, defendant prays the judgment of the court and puts itself upon the country.

TURNEY & BURGES,
Attorneys for Defendant.

For further special answer this defendant says that if the plaintiff was delayed and kept in service for more than sixteen (16) hours, which is not admitted but denied, then no recovery herein can be had on that account for that the casualty which occasioned the delay of the engine and train upon which plaintiff was engaged arose, as aforesaid, after said engine had left the terminal and while same was en route upon its journey; that plaintiff without said delay so occasioned, would not have been sixteen (16) hours upn said train and engine; but that, notwithstanding he may have been sixteen (16) hours upon said train and engine without rest, then no negligence is chargeable to the defendant on that account for that the defendant could not be held liable in law for the happenings in this case for that defendant had the right to keep said plaintiff, notwithstanding the sixteen-hour law, or any other law, until he had reached the end of his journey or a terminal where said engine could be disposed of

for repairs; that, by the terms of the rulings of the Interstate Commerce Commission issued April 1, 1911, and entitled "Conference Rulings of the Commission which have been given publicity from time to time, some of which have not heretofore been officially published," the Commission, by Rule 88, provided that "employees so delayed may therefore continue on duty to the terminal, or end of that run." Adopted June 25th, 1908. The proviso quoted removes the application of the law to that trip.

The proviso quoted and upon which said ruling is made, is as follows:

9 "The provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employee at the time such employee left the terminal and which could not have been foreseen."

That, under the power given the Interstate Commerce Commission by law, it had the right to make and promulgate these rules, regulations and exemptions, and that said rules so quoted, issued and promulgated prior to the alleged accident to the plaintiff were in full force and are now in force and applicable to this case; that under said rules and regulations, the defendant had the right to continue plaintiff in service as a messenger with said engine until the same reached its destination or a terminal or a relay point which was not done at the time plaintiff was injured.

Wherefore, *plaintiff* prays the judgment of the court and puts itself upon the country.

TURNEY & BURGES,
Attorneys for Defendant.

Indorsed: 352 Law. In the District Court of the United States, for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. The Atchison, Topeka & Santa Fe Railway Company, Defendant. First Amended Answer. Filed Sept. 26th, 1912. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

Plaintiff's First Supplemental Petition.

In the District Court of the United States for the Western District of Texas, El Paso Division. Special Term Beginning September 23, 1912.

No. 352.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Comes now the plaintiff, Claude Swearingen, and leave having been first had of this Honorable Court, files this his First Supplemental Petition, and says:

10 First. The plaintiff excepts and demurs to defendant's First Amended Original Answer filed herein on September twenty-sixth 1912, and says: That the pleas of contributory negligence and assumed risk set up by defendant do not constitute a defense at law, for the reason that the plaintiff had been by the defendant at the time of his injury required and allowed to be and remain on duty as fireman on the engine of defendant for the period of more than sixteen hours, and his injuries were caused and contributed to through the negligent violation by defendant of the Sixteen Hour law enacted for the safety of employees on railroads.

Wherefore, plaintiff prays that said pleas of assumed risk and contributory negligence be by this Court stricken out and held for naug

ENGELKING & JOHNSON,
Attorneys for Plaintiff.

Second. And further demurring and excepting to the Defendant's said First Amended Original Answer plaintiff says that while the defendant sets up and pleads that the delay causing plaintiff to work more than sixteen hours was due to a casualty, the defendant wholly fails to describe the character of such casualty and fails to put the plaintiff upon notice as to the particulars of such casualty, and further wholly fails to put the plaintiff upon notice as to the character and description of the causes which brought about the delay and plaintiff's working for more than sixteen hours; defendant fails to give any particularity as to the causes which caused the break-down of the engine and the delay, and fails to state what such causes were that were not known to the defendant at the time the engine left the terminal or beginning point of the run or journey on which plaintiff was injured.

Wherefore, plaintiff prays that the defendant be required to set out with particularity the casualty and unforeseen causes which brought about the delay whereby plaintiff was required to work more than sixteen hours, and ultimately and proximately injured.

ENGLEKING & JOHNSON,
Attorneys for Plaintiff.

And further demurring and excepting to defendant's said First Amended Original Answer plaintiff says that that part of defendant's answer setting up a rule or rules alleged to have been issued by
11 the Interstate Commerce Commission on April first 1911 to the effect that employees delayed as plaintiff was delayed might be by the defendant continued on duty for more than sixteen hours, is unsupportable by law, and should be by this Court stricken out and held for naught, for the reason that if such rule was ever promulgated by the Interstate Commerce Commission the same is without authority of law, as the Interstate Commerce Commission is by no Act of Congress authorized to modify Section Two, Section Three or any other part of the Act of March fourth, 1907, entitled:

"An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon."

ENGELKING & JOHNSON,
Attorneys for Plaintiff.

And for answer, plaintiff denies each and all the allegations in Defendant's said amended answer and demands strict proof thereof.

ENGELKING & JOHNSON,
Attorneys for Plaintiff.

Indorsed: No. 352. Claude Swearingen vs. A., T. & S. F. Ry. Co. Plaintiff's First Supplemental Petition. Filed Sept. 26th, 1912. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

Charge of the Court.

In the United States District Court in and for the Western District of Texas, El Paso Division, at its Special Term Beginning September 23, 1912.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

GENTLEMEN OF THE JURY: In this case the plaintiff alleges that he lost his leg through the negligence of the defendant company. He named several acts and omissions on the part of the defendant and says that each of them constituted negligence causing or contributing to his injury. One of these is that the defendant required and permitted him to be on duty on an engine for a longer period than sixteen hours; another is that defendant placed the disabled engine near the back end of the train instead of near the
12 front end and that the train was stopped and started with an unusual jerk, throwing plaintiff from his position on the pilot; still another is that the sill step of the pilot on the engine which injured plaintiff was placed inside of the rails and should have been outside of the rails, and was too narrow; and the last is that cinders were left on the track and the same were so high and the sill step was so low that the sill step caught them and made his footing insecure.

Now the defendant answers with a general denial and pleads three special defenses: First, that plaintiff contributed to his injury by negligently going on the sill step while the engine was in motion; Second, that he assumed the dangers and injury incident to going or climbing about the engine while the same was in motion; and lastly, that if he was employed for more than sixteen hours at the time of his injury, such employment beyond sixteen hours was due to the sudden breaking of the valve yoke on the engine, and that this breaking of the valve yoke was a casualty, and that the cause of its breaking was not known to defendant or its servants at the

time when the plaintiff left the terminal on the trip on which he was injured, and that same could not have been foreseen.

You are instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. (See 95 U. S. 441-2). Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours, and subject to the instructions that will hereafter be given on this phase of the case, you are charged that if you believe from a preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which is occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time, or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow; or that there was negligence in allowing cinders (if any) to be caught on the sill step where plaintiff was standing; then in any one or more of such events the plaintiff may
13 recover. If the defendant was negligent in none of these particulars you will find for the defendant. And further if the injuries of the plaintiff were the result of a mere accident without fault or negligence on the part of the defendant then the plaintiff can not recover. Every servant is held to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open and apparent to him. If, therefore, you believe that the dangers and injury in this case were such as are ordinarily incident to the employment of a fireman, or were open and apparent to him, the plaintiff cannot recover.

As to the defendant's plea that plaintiff negligently contributed to his injury by going on the pilot while the engine was in motion, you are charged that, although you may believe that plaintiff may have been guilty of negligence by so going on the pilot while the engine was in motion, such fact will not bar the plaintiff from a verdict in his favor if the defendant was also negligent. But in this event you will diminish the plaintiff's damages in proportion to the amount of negligence attributed to him.

Now as to the Sixteen Hour Law: By Sec. 2 of the Act of Congress of March 4, 1907, entitled, "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," it is provided:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or per-

mitted to continue or again go on duty without having had at least eight consecutive hours off duty."

And Sec. 3 of this Act makes it an offense to violate Sec. 2, but contains a proviso as follows:

"Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the
14 carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

The plaintiff was required to be on duty from 7:40 P. M. on December 19th to the time of his injury at 1:25 P. M. on December 20th, 1910, a period of more than sixteen hours. The evidence is undisputed on this point. It is immaterial whether, after the valve yoke broke, the plaintiff was a fireman or a messenger, whether he was on the road or on a sidetrack; he was continuously on duty. The only question is: Was he required to work over sixteen hours on account of a casualty or a cause not known to and unforeseeable by the defendant or its servants at the time he left Pueblo? You are instructed that a casualty proceeds from an unknown cause, or is an unusual effect of a known cause. It may properly be said to occur by chance and unexpectedly (See 139 U. S. 86). No act or result that could have been guarded against or prevented by ordinary care and foresight can be denominated a casualty or an unknown and unforeseeable cause, as these terms are used in this Act of Congress. If you find then from a consideration of all the evidence that the breaking of the valve yoke as pleaded by defendant was a casualty or unknown and unforeseeable cause, as provided by said Act of Congress, then you cannot find negligence in the fact that plaintiff was required to work more than sixteen hours, but you may look to other facts in evidence, if any, to determine whether defendant was guilty of negligence causing or contributing to plaintiff's injury. If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks
15 ordinarily incident to his work or even open and apparent to him at the time he was hurt.

You are instructed that as to his allegations of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence; but touching the allegations as to

assumed risk and contributory negligence and the existence of a casualty and unknown and unforeseeable cause, as pleaded by the defendant, through which plaintiff was required to work over sixteen hours, the burden of proof rests upon the defendant.

You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony and you may give it such weight as you deem it entitled, under all the circumstances, to receive.

If, in view of the evidence and instructions of the court, your verdict be in favor of the plaintiff, you will award him such amount of actual damages as will compensate him for the injuries he has sustained; and in arriving at that sum you will take into consideration the character of his injuries, whether permanent or otherwise, and his diminished capacity to earn money in consequence of such injuries, as well as for the pain and suffering he may have endured in consequence of the same.

If your verdict be in favor of the plaintiff you will return it in the following form: "We, the jury, find for the plaintiff and assess his damages at —— dollars," you to fill up the blank with the amount awarded him. If, however, your verdict be for the defendant, you will simply say: "We, the jury, find for the defendant."

T. S. MAXEY, *Judge*.

Indorsed: No. 352, Law. In the United States District Court, Western District of Texas at El Paso. Claude Swearingen vs. A., T. & S. F. Ry. Co. Charge of the Court. Filed September 28th, 1912. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

16 *Exceptions to the Charge of the Court.*

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Defendant

Exceptions to the Charge of the Court.

Comes now the defendant and in open court and while the jury are still in court and have not retired to consider the verdict, and makes the following exceptions to the court's general charge to the jury in the above entitled and numbered cause:

First. Defendant excepts to the following words of said main charge: "Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours and subject to the instructions that you will hereafter be given on this phase of the case."

The quoted paragraph is excepted to for the reason that the same assumes, independently of any further language in connection therewith, that the defendant was in some manner negligent under the Sixteen-hour Law, or the Hours of Service Act.

Second. Defendant excepts to the following language of the main charge: "That if you believe from the preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sillstep where plaintiff was standing, then in any one or more of such events, the plaintiff may recover."

Defendant objects to the quoted parts of said main charge for the reasons that the court tells the jury that plaintiff may recover,

(*a*) If there was negligence on the part of defendant in placing the disabled engine where same was placed in the train; or

17 (*b*) In the manner of handling the disabled engine by the engineer Artist; or

(*c*) If there was negligence in placing the sill step inside of the rails; or

(*d*) In making it too narrow; or

(*e*) Allowing cinders to be kept on the sill step where plaintiff was standing;

that then, because of the existence of any one or more of said conditions plaintiff could recover, notwithstanding one of the same, or all of same, though negligently placed or permitted, had nothing to do in fact with causing the plaintiff to fall from the pilot of said engine.

Third. Defendant excepts to the following language of the court's main charge: "If the defendant was negligent in none of these particulars, you will find for the defendant."

Defendant objects to this language in the main charge because no verdict can be rendered for the defendant unless the jury are able to find that the defendant was not negligent in any of the particulars named, notwithstanding none of said conditions contributed to or brought about plaintiff's accident which caused him to be injured.

Fourth. Defendant objects to the following language in the court's main charge to the jury: "And further if the injuries of the plaintiff were the result of a mere accident without fault or negligence on the part of either the plaintiff or the defendant, the plaintiff cannot recover."

Defendant objects to this language in the main charge because it makes the defendant liable unless the jury are able to find from the evidence that the plaintiff was not guilty of negligence, when, as a matter of law, if the plaintiff was guilty of negligence in some manner or respect not excusing him and wholly disconnected from any negligence of the defendant he could not recover in any event,

and such charge in the particulars objected to are contradictory of the main charge, especially that part following, to-wit: "Every servant is led to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open and apparent to him."

Fifth. Defendant specially excepts to the following parts of the court's main charge: "And if in the breaking of the valve yoke you find no casualty of such unknown and unforeseeable cause as
18 aforesaid, then, in that event, you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to assume any of the risks ordinarily incident to his work, or even open and apparent to him at the time he was hurt."

Defendant objects to this language in the main charge because the quoted parts are not the law covering this case, and said charge objected to would license the plaintiff, solely because he had been on duty over sixteen hours, to wilfully assume any position of danger or even wantonly cause his own injury and such charge would deny the defendant any right of offset or defense of any kind, and would thereby place upon defendant the burden of paying any damage which the jury might find, notwithstanding the plaintiff had wilfully placed himself in a position of danger, well knowing the result that might follow.

Sixth. Defendant specially excepts to the following part of the court's main charge, to-wit: "You are instructed that as to his allegation of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence, but in its allegation as to assumed risk and contributory negligence and the existence of a casualty and unknown and unforeseeable cause as pleaded by defendant through which plaintiff was required to work over sixteen hours, all burden of proof rests upon the defendant."

Defendant specially excepts to this part of the main charge of the court because same places an unjust burden of proof on defendant not required by law and compels the defendant to assume the burden of the proof by its own testimony, notwithstanding the plaintiff's testimony may itself establish either that the plaintiff assumed the risk or was guilty of contributory negligence, or that a casualty happened, or that the delay was caused from an unknown and unforeseeable cause, and requires plaintiff, notwithstanding these conditions may have been established by plaintiff's testimony, to assume the preponderance of proof in regard to same and each of same.

Exceptions to the Court's Refusal to Give Three Special Charges Requested by the Defendant.

The court erred in refusing to give the three special charges requested by the defendant for the following reasons:

19 As to Special Charge No. 1, because the matters and things therein suggested to the court are not covered by its main

charge, and because the statements therein contained are the law in this case and are required by the evidence introduced to have been submitted to the jury.

As to Special Charge No. 2, which the court refused to give, the defendant excepts because of the court's refusal to give such charge, for the reason that said charge is the law in this case, was suggested and required by the testimony introduced, was not covered by the main charge of the court or any other charge, and same should have been given in order that the jury may consider the defense therein set forth and which was by defendant pleaded as a defense.

Defendant excepts to the refusal of the court to give its Special Charge No. 3 for the reason that said charge is the law in this case, was not given in the court's main charge, or any other charge, was suggested by the evidence and by it required to be given, and further because that part of the court's main charge referring to said accident was erroneous and not the law, for that part of the main charge referring to the accident limited the right of the defendant to recover to the finding by the jury that the plaintiff himself was not guilty of any negligence.

TURNEY & BURGES,
Attorneys for Defendant.

Indorsed: No. 352. Law. Claude Swearingen, vs. A., T. & S. F. Ry. Co. Exceptions and objections to the court's charge and to the court's refusal to give the defendant's Special Charges. Filed Sept. 28th, 1912. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

20 *Defendant's Special Charge No.* 1.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Special Charge No. 1.

GENTLEMEN OF THE JURY: At the request of the defendant, you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit, the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employees at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of

plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-hour Law, or the Hours of Service Act, first, from the casualty; second, an unavoidable accident; and third, where the delay was the result of a cause not known to the defendant, or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left Pueblo, Colo-
21 rado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-hour Law or the Hours of Service Act would have no application to this case.

TURNEY & BURGES,
Attorneys for Defendant.

Refused.
T. S. MAXEY, *Judge.*

Indorsed: No. 352. Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Special Charge to the Jury requested by the Defendant. No. 1. Filed Sept. 28, 1912. D. H. Hart, Clerk. Refused.

Defendant's Special Charge No. 2.

In the District Court of the United States for the Western Dis- of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Special Charge No. 2.

GENTLEMEN OF THE JURY: At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of

any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants and employes, then in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and that should
22 you so find, the provisions of the Sixteen-hour Law or the Hours of Service Act would not apply.

TURNEY & BURGES.

Refused.
T. S. MAXEY.

Indorsed: No. 352. Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Special Charge to the Jury, requested by the Defendant, No. 2. Refused. Filed Sept. 28, 1912. D. H. Hart, Clerk.

Defendant's Special Charge No. 3.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Special Charge No. 3.

GENTLEMEN OF THE JURY: At the request of the defendant you are charged that if you find from the evidence in this cause that when the plaintiff went out upon the pilot of the engine and attempted to go over or along or about the same that he slipped or fell from said pilot to the ground and was thereby run over and injured, and that said act of slipping and falling from said pilot was an accident and that the defendant, its servants, agents and employes in no wise contributed thereto, that then and in that event plaintiff cannot recover and your verdict should be for the defendant.

TURNEY & BURGES.

Refused.
T. S. MAXEY, *Judge.*

Indorsed: No. 352. Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Plaintiff. Special Charge to the Jury, requested by Defendant. No. 3. Refused. Filed Sept. 28th, 1912. D. H. Hart, Clerk.

23 *Special Charge Requested by Plaintiff.*

In the United States District Court for the Western District of Texas, El Paso Division.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Requested Charge No. Two Requested by Plaintiff.

GENTLEMEN OF THE JURY: There being no dispute that plaintiff was on duty more than sixteen hours, and the defendant wholly failing to prove that the delay was caused by a casualty, or a cause that could not have been foreseen when plaintiff left the terminal, and was unknown to defendant at that time, you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours; and if you find such negligence your verdict will be for the plaintiff.

ENGELKING & JOHNSON,
Attorneys for Plaintiff.

Refused.
T. S. MAXEY, *Judge.*

Indorsed: No. 352. Law. Claude Swearingen, vs. A., T. & S. F. Railway Co. Special Charge No. 2. requested by Plaintiff. Filed Sept. 28, 1912. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

Verdict.

In the United States District Court for the Western District of Texas, at El Paso.

Verdict of the Jury in the Case of Claude Swearingen vs. Atchison, Topeka & Santa Fe Railway Company.

We the Jury, find for the plaintiff and assess his damages at Twelve thousand five hundred dollars. ($12,500.00).

ED VICKERS, *Foreman.*

Indorsed: No. 352. U. S. District Court. Claude Swearingen vs. Atchison, Topeka & Santa Fe Railway Company. Verdict. Filed Sept. 28th, 1912. D. H. Hart, Clerk.

24 *Judgment for Plaintiff.*

In the United States District Court for the Western District of Texas, *at* El Paso Division, Special Term, Beginning Sept. 23, 1912.

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Be it remembered that the above styled and numbered cause having been duly called for trial on the 26th day of September, 1912, and plaintiff appearing in person and defendant by counsel, both parties announced ready for trial; and a lawful jury composed of Ed Vickers and eleven others, having been duly selected, empanelled and sworn, both parties read their pleadings, adduced evidence thereunder and made argument on the same before the jury. And the court having duly instructed and charged the jury, the same retired and after due deliberation, on the 28th day of September, 1912, returned into open court the following verdict:

"In the United States District Court for the Western District of Texas, at El Paso.

Verdict of the Jury in the Case of Claude Swearingen vs. Atchison, Topeka & Santa Fe Railway Company.

We, the jury find for the plaintiff and assess his damages at Twelve Thousand and Five Hundred Dollars ($12,500.00).

ED VICKERS, *Foreman.*"

Wherefore, it is by this court adjudged, considered and decreed that the plaintiff, Claude Swearingen, do have and recover of and from the defendant, Atchison, Topeka & Santa Fe Railway Company, the sum of twelve thousand five hundred ($12,500.00) dollars, and all costs by him in this behalf incurred, for all of which he may have his execution. And it is the further decree of this court that the clerk of this court do have and recover from the parties herein the costs by them respectively incurred, for which let execution issue.

Entered Vol. 5, page 314.

25 *Defendant's Amended Motion for a New Trial.*

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

To the Honorable T. S. Maxey, Judge of said Court:

Comes now the Atchison, Topeka and Santa Fe Railway Company, and leave of court first had and obtained, files this, its amended motion for a new trial, and as grounds for such motion says:

That the court, in its main charge to the jury, committed the following errors:

I.

The court erred in charging the jury as follows:

"Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours and subject to the instructions that you will hereafter be given on this phase of the case."

The quoted paragraph is error for the reason that the same assumes, independently of any further language in connection therewith, that the defendant was in some manner negligent under the Sixteen-hour Law or under the Hours of Service Act.

II.

The court erred in charging the jury as follows:

"That if you believe from the preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sill step where plaintiff was standing, then in any one or more of such events, the plaintiff may recover.

26 Said paragraph in the court's main charge is erroneous for the reason that the court tells the jury that plaintiff may recover (*a*) if there was negligence on the part of the defendant in placing the disabled engine where same was placed in the train; or (*b*) in the manner of handling the disabled engine by the engineer Artist; or (*c*) if there was negligence in placing the sill step inside of the rails; or (*d*) in making it too narrow; or (*e*) in allowing cinders to be kept on the sill step where plaintiff was standing; that then, because of the existence of any one or more of said conditions, plaintiff could recover, notwithstanding one of the same, or all of same, though negligently placed or permitted, had nothing

to do, in fact, with causing the plaintiff to fall from the pilot of said engine.

III.

The court erred in charging the jury as follows:

"If the defendant was negligent in none of these particulars, you will find for the defendant."

Said language in the court's main charge was erroneous because no verdict can be rendered for the defendant unless the jury are able to find that the defendant was not negligent in any of the particulars named, notwithstanding none of said conditions contributed to or brought about plaintiff's accident which caused him to be injured.

IV.

The court erred in charging the jury as follows:

"And further, if the injuries of the plaintiff were the result of a mere accident without fault or negligence on the part of either the plaintiff or the defendant, the plaintiff cannot recover."

Said language in the court's main charge is erroneous because it makes the defendant liable unless the jury are able to find from the evidence that the plaintiff was not guilty of negligence, when, as a matter of law, if the plaintiff was guilty of negligence in some manner or respect not excusing him and wholly disconnected from any negligence of the defendant he could not recover in any event, and such charge in the particulars referred to is contradictory of the main charge, especially that part following, to-wit:

"Every servant is led to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open and apparent to him."

27 V.

The court erred in charging the jury as follows:

"And if in the breaking of the valve yoke you find no casualty of such unknown and unforseeable cause as aforesaid, then, in that event, you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to assume any of the risks ordinarily incident to his work, or even open and apparent to him at the time he was hurt."

Said language in the court's main charge is erroneous for the reason that the quoted part is not the law covering this case, and said charge would license the plaintiff, solely because he had been on duty over sixteen hours, to wilfully assume any position of danger or even wantonly cause his own injury, and such charge would deny the defendant any right of offset or defense of any kind, and would thereby place upon defendant the burden of paying any damage which the jury might find, notwithstanding the plaintiff had wilfully placed himself in a position of danger, well knowing the result that might follow.

VI.

The court erred in charging the jury as follows:

"You are instructed that as to his allegation of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence, but in its allegation as to assumed risks and contributory negligence and the existence of a casualty and unknown and unforseeable cause as pleaded by defendant through which plaintiff was required to work over sixteen hours, all burden of proof rests upon the defendant."

Said paragraph in the court's main charge is erroneous because same places an unjust burden of proof on defendant not required by law and compels the defendant to assume the burden of the proof by its own testimony, notwithstanding the plaintiff's testimony may itself establish either that the plaintiff assumed the risk or was guilty of contributory negligence, or that a casualty happened, or that the delay was caused from an unknown and unforseeable cause, and requires plaintiff, notwithstanding these condi-
28 tions may have been established by plaintiff's testimony, to assume the preponderance of proof in regard to same and each of same.

VII.

The court erred in refusing to give defendant's Charge No. 1, which is as follows:

"At the request of the defendant, you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit, the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employes at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

"You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-hour Law, or the Hours of Service Act, first, from a casualty; second, an unavoidable accident, and third, where the delay was the result of a cause not known to the defendant, or its officer or agent in charge of such employee at the time said employee left the terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left

Pueblo, Colorado, on the night of December 19, 1919, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-hour Law or the Hours of Service Act would have no application to this case."

For the reason that said special charge presented the law
29 in this case and same was demanded by the evidence introduced and the matters charged upon therein were not sufficiently covered by the court's main charge.

Said charge was especially demanded because the court's main charge did not separate the casualty as pleaded by the defendant from the delay which was the result of a cause not known to the defendant, or its officer or agent, but coupled said two defenses together in such a way as to lead the jury to believe that they comprised only one defense, when, in fact, under the law, casualty and unavoidable delay from causes not known to the defendant are each separate defenses.

VIII.

The court erred in refusing to give defendant's Special Charge No. 2, which is as follows:

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants and employes, then and in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and that should you so find, the provisions of the Sixteen-hour Law or the Hours of Service Act would not apply."

Because said charge presented the law of this case and was not covered by the court's main charge and was demanded by the evidence introduced. Said charge was especially demanded because the Interstate Commerce Commission provided on June 25, 1908, as pleaded and established by the defendant, that where a delay is caused by a condition which could not be foreseen by the defendant at the time the engine left its terminal, then the employee could be kept in service to a relay or division point of said engine.

IX.

The court erred in refusing to give defendant's Special Charge No. 3, which is as follows:

"At the request of the defendant you are charged that if
30 you find from the evidence in this cause that when the plaintiff went out upon the pilot of the engine and attempted to go over or along or about the same that he slipped or fell from said pilot to the ground and was thereby run over and injured, and that

said act of slipping and falling from said pilot was an accident and that the defendant, its servants, agents and employes, in no wise contributed thereto, that then and in that event plaintiff cannot recover and your verdict should be for the defendant."

Because said charge is the law of this case, was called for by the evidence and was not covered by the court's main charge and should have been given.

X.

The verdict of the jury rendered in this cause is against the evidence and not supported by the evidence in this, that the statement made by the plaintiff and read in evidence by the plaintiff and dated Jan. 7, 1911, plainly shows that the injury to plaintiff was occasioned wholly by an accident and not while the plaintiff was in the discharge of any duty required of him; that the plaintiff, at the time he was injured and fell from the point of the pilot, was not engaged in oiling the cylinders of the engine but has passed beyond the cylinders from the place where he had been riding, to-wit, on the cab; that the evidence in this cause shows that the plaintiff could have reached the cylinders of the engine over a perfectly safe route by stepping from the cab to the ground and then walking along the engine, almost at a standstill, to the cylinders and there oiled the same, but, on the other hand, that plaintiff did not follow the safe course but climbed over the engine along the running board, down on to the pilot and to the very front extremity thereof where there was no cylinder to be oiled, and where, without any duty to be performed, he was standing when, as he states, from some unknown cause which he cannot explain, he fell from the pilot and was run over.

XI.

The verdict of the jury in this case is excessive when measured by the evidence introduced and is for much more than the earning power of plaintiff, as established, would justify and the court should require a remittitur to a sum which is warranted by the testimony.

Wherefore, and for the errors complained of, defendant moves the court to grant it a new trial; and, in any event, the de-
31 fendant moves the court to reduce the verdict of the jury to such an amount as to the court may seem just and right.

TURNEY AND BURGES,
Attorneys for Defendant.

Indorsed: No. 352. Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Defendant's Amended Motion for a new trial. Filed Oct. 3, 1912. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

Order Overruling Motion for New Trial.

In the District Court of the United States, Western District of Texas, El Paso Division, October 5, A. D. 1912.

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO.

Be it remembered, that on this the fifth day of October, A. D. 1912, there came *to* to be heard before the Court the amended motion of the defendant to set aside the verdict and judgment heretofore rendered and entered herein, and to grant it a new trial of this cause, and said motion having been heard and duly considered, it is the opinion of the Court that the said motion should be in all things over-ruled, and it is accordingly so ordered.

Entered Oct. 5, 1912. Vol. 5, Page 337.

Order Extending Time to File Bill of Exceptions.

In the District Court of the United States, Western District of Texas, El Paso, Texas, September 30th, A. D. 1912.

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO.

Upon application of Counsel, it is ordered by the Court that
32 the Defendant, Atchison, Topeka and Santa Fe Railway Company, be, and is hereby allowed thirty days from and after this date in which to prepare, present for approval, and have filed its bill of exception- herein.

Entered Sept. 30, 1912. Vol. 5, Page 323.

Agreement for Additional Extension of Time to File Bill of Exceptions.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

It is agreed by and between counsel representing plaintiff and defendant that the time of filing and approving the bill of exceptions in the above styled and numbered cause is hereby extended for ten (10) days from the time in which it should be filed, in case same is not allowed in the 30 days granted def't for *his* bills.

ENGELKING & JOHNSON,
Attorneys for Plaintiff.
TURNEY & BURGES,
Attorneys for Defendant.

Indorsed: No. 352. Law. Claude Swearingen vs. A., T. & S. F. Ry. Co. Agreement for 10 days additional to file Bill of Exception-. Filed October 29, 1912. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

Order Re-extending Time to File Bill of Exceptions.

United States District Court, Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

Upon considering the agreement of the parties filed herein,
33 stipulating that the time in which the defendant may file its bill of exceptions in this cause may be extended:

It is ordered that the defendant, Atchison, Topeka and Santa Fe Railway Company, have and is hereby allowed ten (10) days from and after this date in which to prepare, present for approval and file its bill of exceptions herein.

The Clerk will duly enter this order of record at the El Paso division of the Court.

Ordered at Austin, Texas, this the 1st day of November, A. D. 1912.

T. S. MAXEY, *Judge.*

Ent'd Nov. 4, 1912. Vol. 5, page 426.

Defendant's Bill of Exceptions.

In the United States District Court in and for the Western District of Texas, El Paso Division, at Its Special Term Beginning September 23rd, 1912.

No. 352. Law.

CLAUDE SWEARINGEN
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

Be it remembered that on the 26th day of September, 1912, the above entitled cause came on for trial before the above court and the jury duly empanelled, Hon. T. S. Maxey presiding, the plaintiff appearing by Messrs. Engleking & Johnson, his counsel, and the defendant appearing by Messrs. Turney & Burges, its counsel, and the following proceedings were had: This being an action at law to recover damages against the defendant because of its alleged negligence as an Interstate railroad and common carrier, it being alleged that defendant was negligent for placing a disabled engine where same was placed in a particular train and the manner of handling the disabled engine by the engineer in charge of the train handling said engine, and in placing the sill step on the pilot of the engine inside of the rails instead of outside, and allowing cinders to accumulate in the track, and in requiring the plaintiff to be on duty for more than sixteen (16) hours in violation of the law, and as a result of said negligence the plaintiff, who was fireman in the
34 service of defendant, was caused to fall from an engine and sustain the loss of a leg.

Be it remembered that on the trial of said cause the following testimony was taken:

Plaintiff's Testimony in Chief.

Direct examination:

CLAUDE SWEARINGEN, having been duly sworn, testified as follows:

My name is Claude Swearingen. I am the plaintiff in this case. I live at St. Paul, Texas. On the 20th day of December, 1910, I was fireman on the Atchison, Topeka & Santa Fe Railroad Company, the defendant in this case. I was working between Pueblo and Denver, Colorado. My headquarters were at Pueblo, and I was working on the Colorado Division from Pueblo to Denver. I was injured on the 20th of December, 1910, while running from Pueblo to Denver North. The train on which I was working when I got hurt was Train 87. The train I started out on was No. 631, which operates from Chicago to Denver. That was a through train. My engineer was named George Meister. The Atchison, Topeka & Santa Fe operates trains between the two points mentioned and I was acting as fireman from Pueblo to Denver. I was injured on December 20th

at 1:25 in the afternoon on Tuesday. I started out on this trip the night before, the 19th, at 7:40 P. M. I had come in from a trip at 7:25 o'clock the previous morning. I had been to Colorado Springs and back to Pueblo. I started on that trip at 4:40 o'clock P. M. of the 18th. George Meister was the engineer on that trip, and I had Engine No. 104 Moffat, which was the same engine I had when I was hurt. It is 45 miles from Pueblo to Colorado Springs and 90 miles for the round trip. I do not remember exactly how long we remained at Colorado Springs, but we were not there more than an hour or two. From 4:40 o'clock in the evening of the 18th to 7:25 o'clock the next morning I was going from Pueblo to Colorado Springs and back.

Whereupon, counsel for Defendant objected to the introduction of any testimony about a former trip because the pleadings contain no allegations relative to same, and same was not set up as a cause of negligence. The Court overruled said objection, to which action of the Court in overruling said objection the defendant, through its attorneys, then and there duly excepted and saved their exception.

35 Continuing witness stated: When I started out on this trip from Pueblo to Colorado Springs which began on the 18th, the engine foamed badly.

Whereupon counsel for Defendant objected to any testimony with reference to defects in the engine at that time because it is not mentioned in the pleadings. The Court overruled said objection; to which action of the Court in overruling said objection the defendant, through its attorneys, then and there duly excepted and saved its exception.

Continuing witness stated: By foaming is meant that instead of getting dry steam the water raises and goes over with the steam and you get wet steam. The water raises and goes down in the cylinders and washes the oil off the valves.

Whereupon the Court stated that all testimony with regard to the first trip and defective engine would be excluded and instructed the jury to disregard the same.

Continuing witness stated: I started out on the last trip at 7:40. I was called for 8:40 and I went on duty at 7:40. I reported an hour before leaving time because I was required to do so by the rules of the Company. The call boy called me. I was at home in bed and he called up and my mother answered the phone and called me. That was 7:40 in the evening that I reported. The train on which I left was going to Denver, but it only got to Palmer Lake. At Palmer Lake we broke a valve yoke on the right side of the engine, inside the chest. We broke the valve yoke about half way between Monument and Palmer Lake. Pueblo is about 119 miles from Denver; and we had gone about 63 miles when the yoke broke. We had been out 15 hours when we broke down. We were 15 hours in making 63 miles, or about 4 miles an hour. That is not the usual rate of speed by a long ways. I cannot tell exactly what

length of time is required to make the 119 miles from Pueblo to Denver according to the schedule, but it is something like 7 or 8 hours. The train I was on was a through freight. When the valve yoke broke between Monument and Palmer Lake the engineer came to a dead stop. The engineer then got down and said "I guess we have broken a valve yoke." He then asked me to get up in the cab and move the reverse lever. I got up and tried to move the lever, but could not, because it was dry; there was no oil on it. I am not much of a machineman and cannot tell you exactly what a
36 valve yoke is; but it is inside the steam chest as I understand it. It works in between two surfaces; and when it gets dry it won't work back and forth and it gets hot; and if you keep working it in that condition it will break. I tried to work the reverse lever and could not budge it; and then the engineer got down and disconnected the wrong side; and then he connected that side up and disconnected the other or broken side. Then he had only one valve to work with. Then we went back to Monument. They pulled us back by train 87 is the way I understand it. They switched our train out and cut us in their train and started up to Palmer Lake. The engineer was with us until we got to Palmer Lake and the engine was working, helping the other engine. Our engine was working on one side. Our sixteen hours was up when we got to Palmer Lake. At that place the engineer went in and got permission, I suppose from the trainmaster, to go into Denver on the Passenger train, No. 607. The engineer left me on the engine and told me what to do; and how to do the oiling before he left. When this engine was brought in to Palmer Lake it was working steam, but from Palmer Lake on it was not working steam, but was just a dead engine in the train. It was just as dead as a flatcar. They put our engine in the back end of the train No. 87. I do not remember how far from the engine it was; but I believe they had about 15 cars in their train. There was a caboose behind us. When the engine operates, works along the track it is lubricated by a lubricator that is worked from the cab. When the lubricator is not working you lubricate the valves through the indicator plug holes and through the release valves. The engineer can oil the engine without getting out on the ground. The engine will have to be drifting along, not working steam. This valve is inside the steam chest and when it is drifting along and not working steam this valve drops and the suction of the valve back and forth makes a suction and works the oil in. This engine had to be greased by coming out of the cab. The engineer said "Whenever you see they are going to stop you go out there and be ready to oil them indicator plug holes, as you don't know how long they are going to stop, so be ready." You cannot grease the release valves of an engine while it is standing still; but they have to be greased while the engine is drifting not working steam. I was ready to go down on the pilot to be ready to oil the indicator plug holes when they were going to stop. There is
37 a little bit of a thing provided to stand on on the pilot, about 14 inches long and about 3½ inches wide. It is made of wood and is attached to the bottom of the pilot or cow-catcher. This

step was about four or five inches from the rails. I was instructed to do this work on the side track at Palmer Lake by the engineer. The sill step I speak of was inside the rails and attached in front of the cow-catcher or pilot. I had been on the road 16 hours when the engineer left me. We were delayed about an hour by the breaking of the yoke. When the valve yoke broke we were about half way from Pueblo to Denver. We had stopped about two hours in Colorado Springs to take coal and water. At the rate we had been running it would have taken all of thirty hours to get into Denver; but when we broke down we were on top of the hill and we would have gone faster. When we were at Palmer Lake I left before the engineer did. We next stopped at Castle Rocks; and were going into the side track and were very nearly stopped in order to let the brakeman make the switch; and after he got the switch they drifted down in the switch and after they got in they had to let him shut up the switch, and then they drifted down maybe a train length. But going in on that side track the cylinders began to groan and I went out and was going to oil those cylinders. I went out on the left running board, which was the only place to go; and I got out on the pilot; but before I got out there we came to a pile of ashes that was high enough to get up on that step. Just then the train made a sudden jerk, jerking my foot some way off the step and I tried to get another foothold on that step but could not on account of the ashes, and the train stopped again, knocking my foot off the head of the pilot on to the ground, and I threw myself some way or other, getting my foot caught and the pony truck wheel went over it and cut it off. The ashes I spoke of were coal cinders, as they burn coal there and have no oil. The wheel ran over my foot or leg but did not cut it off completely. I hopped on one foot up to the pilot and put my foot on that step where the ashes were and lifted myself over the drawbar and looked out and saw two of the trainmen, Jackson and L——, and I said "Hey," and I believe Jackson came around and said "My God, boy, how did you do that," and he took hold of me and took me into the depot and bandaged it up. My
foot was hanging and I told them to cut it off and I believe
38 Jackson cut it off with a knife. It was just hanging by a
small piece of flesh. At the time the jerk came I was more dead than alive. I was sleepy, tired and hungry. I had had nothing to eat as they did not give me time to eat in Colorado Springs.

Whereupon the Defendant, through its counsel, objected to any testimony with reference to having nothing to eat at Colorado Springs, because there was no allegations relative thereto in the pleadings. The Court sustained the objection.

Continuing the witness stated: I got hurt at 1:25 in the afternoon on December 20th, and I started at 7:40 on the evening of the 19th. The difference between putting an engine in the back end of a train and in the front end is this: The engine being so much heavier than an ordinary car, that when the slack runs out it gives a jerk; and when the slack runs in it runs in like a shot; and when it is placed next to the other engine that absorbs the shock. The jerk occurring

at the time I was hurt was a pretty good jerk, a fierce jerk. The ashes and jerk threw me from the pilot sill step. I did not have any foothold on the step on account of the ashes and cinders. And I was so tired, sleepy and hungry I was not in physical condition to stay on easily. The sill step I spoke of was between the rails. The difference between a sill step being inside the rails and one being outside the rails is this: Where a sill step is inside the rails if you were jerked off you would go down in front of the pilot; whereas, if the sill step was outside the rails you would fall outside and clear of the rails. If the step was inside the rails you would fall under the pilot and would catch against the rails. The train on which I was running operated from Chicago to Denver; and train 87 operated from somewhere in Kansas to Denver. Denver is not on the main road; but is on a branch line. The main line runs from La Junta to California, also to El Paso and Amarillo, Texas. The sill step on which I was hurt was 3½ or maybe 4 inches wide. I did not measure it. It was made of wood and the surface was not slick, but was a little rough. The difference between a sill step that is very narrow and one being 6 or 7 inches or more in width is the danger in getting knocked off. I have seen other sill steps, and they were outside of the pilot beam. I do not know of a rule concerning the position at which sill steps should be placed. It is the Government rule.

Whereupon Counsel for Defendant objected to any testi-
39 mony with reference to a Government rule, on the ground that the rule itself was the best evidence. The Court sustained said objection and Plaintiff excepted.

Continuing witness stated: I have seen other sill steps on the same road,—the Atchison, Topeka & Santa Fe Railroad. They were placed outside the rail on the end of the sill. They were about 10 or 12 inches in width and made out of iron and were probably six inches through, from the front of the step to the back, and it had things there to keep one from going through. It was made of cast iron or iron of some sort. It was 12 inches long and about 6 inches wide and is made to stand on. I guess all the engines in this State have *those* kind of steps.

Whereupon counsel for defendant objected and moved to strike out the witness' answer with reference to "guessing." The court sustained said objection.

Continuing the witness stated: All I have seen were in that condition.

Whereupon counsel for defendant objected and moved to strike out the witness' answer from the record upon the ground that it was not shown that such sill steps were the best or in general use; that the railroad company was not required to use the highest degree of care to find safe appliances, but to use ordinary diligence to use safe machinery. The Court overruled said objection, to which action of the Court in overruling said objection the Defendant,

through its counsel then and there duly excepted and saved its exception.

Continuing witness stated: I have seen these steps at Denver, Pueblo and La Junta. I do not know how long such steps have been in use, but they have not been in use as long as the kind on which I was hurt. The sill steps of which I speak (iron sill steps) average about 10 inches or one foot off the ground; and the sill step on which I was hurt was 5 or 6 inches from the rail under your foot. The pile of cinders was high enough to get on the step on which I was standing. The cinders came up to my ankle. I was required to be on duty at the time I was injured by the engineer's orders. I have the rules of the Company with me.

Whereupon counsel for Defendant objected to the introduction of the rules of the Company on the ground that same were not plead.

The Court overruled said objection, to which action of the
40 Court in overruling the Defendant, through its attorneys, then and there duly excepted and saved its exception.

Continuing witness stated: The rules I hand you are the rules and regulations of the Defendant Company concerning my services.

Whereupon, counsel for the Plaintiff read in evidence Rules Nos. 491, 492 and 498, contained on pages 64 and 65 of the Rules and Regulations of the Santa Fe Railroad, as follows, to-wit:

"491. Firemen, when on the road, are under the direction of the enginemen, and subject to the orders of the trainmaster. When in the shop they are under the orders of the Master Mechanic or foreman of the shop.

"492. They must be on their engines at least thirty minutes before time of starting, and conform to the directions they may receive from the enginemen.

"498. They must take charge of the engine should the engineman at any time be absent, and will not leave it until his return, and under no circumstances permit an unauthorized person to be upon it."

Continuing witness stated: I am 30 years old, or will be next February. At the time I was injured I was earning from four and a quarter dollars a day on up. My run paid me that much without overtime. I received straight time or 36½ cents per hour for overtime. My average earnings was between $100.00 and $131.00 per month, the latter amount being the most I ever made. My leg is cut off seven inches below the knee. I never measured it, but that is what the doctors told me. It is the left leg which is cut off. At the time of the injury I certainly suffered pain. The pain I suffered is beyond explanation. It was certainly intense; and I was in so much pain I did not know what I was doing. That pain continued until after they operated on me in Denver. I went in from Castle Rock to Denver on the same train that the engineer came in on. They put me in the baggage car and the engineer rode in there with me. I cannot say when I arrived at Denver, as I was in too much pain to ascertain. It is about 30 miles from Castle Rock to

Denver, and is in the neighborhood of an hour's run. I was not thinking of time at that time; I had something else to think about. I was placed in a hospital at Denver and they amputated my foot and a part of the limb. They gave me an anesthetic, ether.
41 There was no pain immediately after coming out from the influence of the ether; but in a couple of days my leg throbbed and burned. I do not know exactly how long I was in the hospital, but it was about a month. Since then I have been able to earn only about $80.00 or $90.00. I could earn more than that if I could get a job; but I have not been able to earn more than that, although I have tried. The engine that picked my engine up and carried us from Palmer Lake to Castle Rock moved faster than we had been moving as it was downhill. I cannot say whether that train stopped between Palmer Lake and Castle Rock or not, as I was too tired to pay any attention to that.

Cross-examination:

I do not remember the time of day Engine 104 was disabled, but I remember how long we had been on duty. It was after 10 o'clock that Engine was disabled, and it was on the 20th of December, 1910. I may be mistaken to the extent of a few minutes, but not to the extent of a few hours. We started from Pueblo at 8:40 at night on the 19th of December, and went on towards Denver. We were between Monument and Castle Rock when the engine was disabled. It was cloudy that day and there had been snow that night. I did not look at my watch to see, but it was about 10 o'clock in the morning that the engine was disabled, as near as I can tell. I cannot tell exactly how long we remained on any one siding; but as near as I can tell we were at Colorado Springs about an hour. I cannot tell now at what other points we stopped. Four miles an hour is about the time we were making. It is not a fact that we made the usual time up to the time the engine was disabled. It was my understanding that Train 87 picked us up when our engine was disabled, but I was so tired and sleepy I do not know about that. I cannot say whether my own engine pulled us back or not. I guess that was an important thing. My name is Claude Swearingen. I cannot tell where I was on the 7th day of January 1911. I believe the signature you show me is in my handwriting. I remember making the statement you show me very plainly, and I remember writing the sentence "I have read the above statement and find the same to be correct to the best of my knowledge." Claude Swearingen. I was hurt on the 20th of December, 1910, but I do not know what date I left the hospital. After I left the hospital I went home to Pueblo. I stated in that statement shown me that I was 28 years old and that I lived
42 at 917 Court Street, Pueblo. I was a fireman on the joint track operated by the C. & S. and the Santa Fe, between Pueblo and Denver. On December 20th, 1910, I was on Engine 104, Moffatt, running from Pueblo to Denver in Train No. 631, and on that train we broke a valve yoke between Monument and Palmer Lake and we were pulled back to Monument, according to my un-

derstanding, by Train No. 87. I said in the statement that they switched us around and got the engine in the middle of the train.

Direct examination:

The statement shown me is not in my handwriting. The Claim Agent wrote that in the hospital.

Recross-examination:

The engine was put in the back end. There may have been a car or two between the engine and the back end of the train. There were about 15 cars in the train just to make a guess at it. Therefore the engine was not in the middle of the train. I do not remember that there were about 12 cars in that train. I do not know whether the engine would be properly loaded if there were 12 cars in the train and the engine was put 5 cars from the end of the train, but I do not believe it would be. The disabled engine should have been next to the engine. I do not know what the rule of the Company is as to proper loading of a disabled engine. Mr. Meister was my engineer. At Palmer Lake he got permission to go in on the passenger train. I did not see the permission. The engineer told me to attempt to oil this engine while it was in motion. He told me when I saw they were going to stop to oil it. I know enough myself to know that I could not oil the release valves while it was not in motion. The engineer told me to be out there and be ready to oil it. He told me to go out there on the pilot while it was running and be ready to oil the indicator plug holes when it stopped. I could not have stayed in the cab and waited and complied with the engineer's orders. I could not have stepped from the cab on to the ground and walked along the side of the engine when it stopped and complied with my order. The engineer did not say for me not to get on the ground but to climb to the running board and on to a dangerous place on the pilot and hang out there; but he said to be ready, and it is the practical way to go out on the running board. I had oiled the release valves after we left Palmer Lake while the train
43 was running. I do not know how fast the engine was running at the time, but it was making time between stations. I climbed around in the same way, but I did not get down on the step. I saw the step and saw it was only 3½ or 4 or 5 inches from the rail. I knew all about the pilot and the little step of wood I spoke of; and when this engine moved into the side track at the rate of two or three miles an hour I climbed over the running board instead of on the ground to get to the front of the engine. I did not know I was going to meet a train at that point, as I was relieved of all responsibility of train orders. We do not go on to side tracks for fun. I believe a passenger train passed us at that place. I did not know as a railroad man they were going in there so a train could pass us, as that was a local train and they might want to unload freight. I do not know that they stopped for that purpose as a fact, but I believe I was told that afterwards. When I was working around this narrow step I had my back to the front of the engine kind of

catercornered. The pilot was somewhat under the coupling of the car in front of it; and in order to work around there I had to lean towards the head of the boiler, but I did not have to go under the coupling, nor did I cross over it until I was hurt. I held to the pin-lifter. I did not hold to the hand holds on the car because there were none handy. They were there but they were not handy or practical. The end of the pilot did not stick very far under the car if it stuck under at all. The coupling on the engine did not reach out to the end of the pilot if I remember right; and the end of the pilot was a little beyond the coupling. The engine and the car were brought right together, especially when the slack was out. There is always a little handhold on the end of the boiler and a number plate; and down on a level with the boiler is a little platform and center pin comes up through there. I do not remember how long or how wide that platform is. I went to the pilot on the same side of the engine I left the cab and had gotten to the pilot and was standing there. I did not stand on the platform because I was told to stand at another place. I was within a step of the platform, but to get on it would not be complying with my orders. I did not know how long they were going to stop. It was my orders to jump the first second it stopped for fear it was going to run off. The engineer said to be out there, out on the pilot. He told me to be out there and "out
44 there" means on the pilot, and could not have meant out on the ground or at any place but this little step. I could have stayed on the running board instead of the step, but that was not my orders. The engineer says "As soon as you see the train is going to stop be out there, because you do not know how long they are going to stop." He did not say out on the pilot, but he said "out there." When I was standing on this little step looking down I could see about three feet of ground up and down the track between the end of the pilot and the car ahead, as the bottom of the car was high enough for me to see down. I was not looking for cinders. The idea of cinders occurred to me right at the time. I do not know whether I put that point in that statement introduced here or not; I don't know what I put in there. I have no recollection of writing the Company a letter about this case. The signature you show me is mine. That may be a notice of my claim. I believe I filed a claim through a lawyer about the 14th day of February, 1910.

Whereupon counsel for plaintiff objected to counsel interrogating the witness with reference to the letter unless he introduced the letter in evidence. The Court sustained said objection. Continuing witness stated:

When this engine was disabled I had no one to relieve me; I stated awhile ago I was relieved at Palmer Lake, but not at the breakdown. I was relieved at Palmer Lake and was told to pilot the engine in; and from then on I suppose I was what is called a "messenger." I was relieved of all orders and duties according to the Government law; but I was only relieved of the responsibility of executing train orders. I was not firing the engine or doing anything of that kind. If the following statement is the statement you

are reading from, I made it at the time; "The engineer had taken out a couple of plugs in the cylinders and he told me when I got a chance to put oil in there and I was going out for that purpose when I was hurt." That is a fact. He told me to be out there and be ready. I said there were no defects in the pilot itself. I said "There were no defects in the pilot that I know of that would cause me to fall," but I had reference to the pilot itself; there was nothing broken about the pilot. Everything attached to the pilot is the pilot. The step is a part of the pilot. The statement that "there were no defects on the pilot that I know of that
45 would cause me to fall," is right. In the statement "there was a little dirt on the foot board or step on the engine" I had reference to the cinders. I did not tell the claim agent any more than I had to; but everything I told him was true, and my endeavor was to tell him the truth at that time, whether for or against me, to keep nothing back. There was no controversy between me and the company at the time the statement was made. The train was just drifting along when I left the cab of the engine. The statement "when I fell my foot hit the ground is right; it went from the pilot on to the ground. It is not a fact that my foot did not hit in a pile of ashes or cinders, but hit the ground. A person cannot see all that was done in a moment of excitement and doesn't gather all the information at the time. I slipped off that pilot because of the ashes on it. It is not a fact that my foot slipped and I fell to the ground and that was when I first knew of the ashes there; but the ashes go on that step after I was standing on it, as I remember that distinctly. My foot hit the ground and turned in under the pilot, and turned over and I could not pull my foot out, although I tried my best. When my foot was under the pilot my body was lower than my foot. I threw myself outside the rails. I did not fall down between the rails, but I threw myself outside the rails. My foot was under the pilot; and the pilot extends out through the center of the rails. After the accident I was taken to the station and then taken to Denver to a hospital and cared for. I suppose I was conscious from the time of the accident until I was put under the influence of ether in the hospital. The day before I started on this trip I fired a trip from Pueblo to Colorado Springs. I said also that I was at an investigation the day before I took this last trip. I was at the investigation from 9 o'clock until 12:10, or three hours and 10 minutes. Engineer George Meister and the train crew on the other train were also there. I do not suppose I was there any longer than George Meister. I insist I was at the investigation 3 hours and 10 minutes because I took the time, as the Company always asks you what time it was if anything happens. The reason I did not tell about the cinders on the track in that statement was because I considered it my business to tell only what I wanted to. I made the remark that there was dirt on that step. The dirt was not on the step when I went out there, but after I stepped on the step we came to
46 this pile of ashes in the track. I never said a word about the ashes to the claim agent. I said there was dirt on the step at that time, and now I say it was ashes and cinders. I did not step

on the ashes when I went to the pilot because it was not there when I stepped down, but the ashes came there after I had *been* stepped on the step. When I made the statement "As far as I know the step was in good condition" I had reference to the step itself. It would not have been in good condition if it was covered with dirt; but the claim agent asked me about the step and I did not say anything about the dirt. The statement "There was no snow or ice on the pilot of the engine at the time" is correct, as is also the statement, "The wheel of the engine that ran over my foot just made a half a turn after it ran over my foot." I cannot tell definitely how long I had been standing on the steps, in that dangerous position, when the accident happened, but it had not been very long. I was by myself, with no one present. I did not know the train crew personally that picked me up, but I knew the engineer. I arrived in Pueblo at 7.25 on the morning of the 19th of December. I went to the roundhouse, registered, washed myself and walked home, took a bath, ate breakfast and went to bed; but I did not go to sleep. I was lying there when the phone rang and my mother answered the phone and told me that the roundhouse clerk called up and asked me to report at the office immediately for an investigation. That was the trainmaster's office where they wanted me. I remained there from 9 to 12:10 o'clock. I then went by the roundhouse, which was on my way home, and tried to lay off as I was feeling too bad and could not. I asked the call-boy to lay off. He was the man in the office at the time. I then went home and went to bed, and slept until they called me between 6:30 and 7 o'clock. I did not say in my direct examination that I was called at 7:40 and the train was to go at 8:40. It requires all the way from 12 to 16 hours to make the run from Pueblo to Denver. It is uphill all the way from Pueblo to Palmer Lake; and the engine just about moves on that trip to Palmer Lake, which is usual. It is a heavy pull even for a passenger train. The time consumed in going from Palmer Lake to Denver is always shorter because it is downhill. I do not know that it is about a one per cent grade; nor do I know the grade from Pueblo to Palmer Lake, but — is a very steep grade. Freight trains do not
47 make very fast time on that division on account of that long pull of 63 miles. I was injured at 1:25 in the afternoon of December 20th, 1910. I should judge three hours elapsed from the time my engine was disabled until I got hurt. During that period I was piloting the engine; and after we were disabled I help- fire the engine up the hill. The engineer, George Meister, controlled my movements at the time. We were pulled in and we helped along; the engine that picked us up was pulling and we were pushing. We backed down to Monument which was South of where our engine was disabled; and then when we started on from Monument in the train that picked us up we helped them up the hill as much as we could. We did not go up any hill in going back to Monument, as it is downhill; and I did not have to do any firing then, but I had to keep my engine alive though. I did not say that I helped to pull that train downhill; but I said I helped to pull the train from Monument to Palmer Lake after we broke down. At Monument our

engine was put in another train and we started for Palmer Lake and we had to go up hill again, and I helped with my engine, working only one side. The engineer did not take the passenger train until we got to Palmer Lake. At Palmer Lake the engineer wired in and got permission, I suppose, to go in. Before the engineer left he removed two indicator plugs. There are two independent engines, or two cylinders, to each locomotive. When the valve yoke broke the engineer had to experiment in order to discover which side the break was on; and the only way he could discover that was by getting me in the cab and pulling back on that reverse lever. The lever would not move because the valve was burnt. As well as I remember the train which picked us up had 12 or 15 cars, and I helped pull that train up to the next station. I oiled the disabled engine at one place while it was running through the release valves; but the second time I was going to oil it after it was stopped through the indicator plug holes. The engineer told me to oil it whenever it was necessary. Anyone could see that it needed oil. I could not say how many miles back I had oiled the engine, because I was too tired to tell, but it was somewhere along in about Greeley, which is about 10 miles from where I was hurt. Mr. Artist was the engineer of the train that picked us up and Oscar C—— was the conductor. I believe that the side track on which we went in where I was hurt holds two ordinary trains of about 20 cars. The map you show me represents the
48 place where I was hurt. I got hurt two or three lengths south of the depot on the side track. The point indicated on the map is as near as I can show the exact spot where I was hurt. The siding on which I was hurt is on the left of the main line going North; and we came in on that about 1:22 as near as I can tell. The train about cleared the main line and stopped. They had to stop in order to let the rear brakeman throw the switch. The train went on farther, about 10 or 12 car lengths, and then came to a full stop and there is where I got hurt. I did not know before reaching Castle Rock that we were going to take the siding there. I dozed off on that engine a little bit, and nodded my head, but did not go sound to sleep. I cannot state more definitely when the engine was disabled further than it was about 10 o'clock. I was 16 hours on duty when we got to Palmer Lake after the engine was disabled. We arrived at Palmer Lake about an hour after the engine was disabled. I cannot say that we were two hours and some minutes getting to Palmer Lake after our engine was disabled, because I did not put the time down. I state that we had been on duty 16 hours because I heard the engineer say we were dead, right at Palmer Lake and he meant by that that our time was up, that the Federal time was up.

Whereupon counsel for defendant objected and moved to strike out the answer of witness with reference to what he construed the engineer to mean. The Court overruled said objection, to which action of the Court in overruling said objection the defendant, through its attorneys, then and there duly excepted and saved its exception.

Continuing witness stated: The engineer did not say that the

engine was dead. I knew exactly what he meant when he said "we are dead." He said that at Palmer Lake. The Santa Fe has machine shops at Denver to repair that engine, and the engine belonged at Denver and that was the natural place for it. The engineer could have acted as messenger as well as I. I had to agree to act as messenger under the orders. I did agree to act as messenger, but I had to do so.

Redirect examination:

The claim agent wrote that statement that my name appears on and which you exhibit to me.

Whereupon counsel for Plaintiff offered in evidence the
49 written statement of plaintiff. There being no objection same was admitted, marked Exhibit "A" for identification and read to the jury.

Continuing witness stated: I was in the hospital at the time. I do not know whether the date shown there, January 7, 1911, is correct or not. At that time I had a severe headache, as I had been lying in the hospital a long time. My leg was healing all right, but was throbbing. The claim agent was there to get a report out of me. He did not say anything about settling my case, but he said "When you get out we will settle with you." He never paid me anything. I told the claim agent at the time, as contained in that statement, that "the engineer, Mr. Meister, got off at Palmer Lake and said he was going to deadhead in on 607 and left me in charge of the engine after being on duty 17 hours and 15 minutes."

Whereupon counsel for defendant objected to any interlocutory questions from the statement of plaintiff which are not connected with the parts that counsel for defendant asked witness about, on the ground that such answers would be self-serving declarations and could not be given in evidence from a statement which was the statement of plaintiff himself. The Court overruled said objection; to which action of the Court in overruling said objection the defendant, through its counsel, then and there duly excepted and saved their exception.

I told the claim agent that the engineer left me in charge of the engine with instructions to oil the engine when I thought it was necessary. I do not remember all I told the claim agent; but I do not think the statement contains all that I told him. The claim agent wrote that statement introduced in evidence here right before me in the hospital at Denver. The claim agent asked me if the engineer had permission to go in and I told him I did not know anything about it. I do not remember whether the claim agent asked me anything about why the engineer didn't stay in charge of the engine and why I stayed on. When we were going from Monument to the place where the engine was disabled, it was going along very slowly. In going from Pueblo to Palmer Lake the engine was not making speed that under ordinary circumstances it should have made.

Whereupon counsel for the defendant objected to any testimony with reference to the speed of the engine from Pueblo to Palmer Lake on the ground that there was no allegation of that kind
50 in the pleadings. The Court overruled said objection, to which action of the Court in overruling said objection the defendant then and there duly excepted and saved their exception.

Continuing witness stated: We were going slower than our regular speed because we were *not* of steam and the valve was dry and hot. The valve yoke is in the cylinder or steam chest. The valves were dry because the engine foamed and washed all the oil off the valve. The boiler will foam because it becomes full of dirt and scale. When it foams the water raises up with the steam and wet steam will go down in the steam chest and out through the stack. That occurs whenever the boiler foams; and is caused by the boiler being dirty and needing washing out. I do not know how often a boiler should be washed out; but I think about every 3 or 4 hundred miles. I made a trip on this same engine the day before, and the engine foamed on that trip. It seems to me it took 14 or 16 hours to make that trip; and the schedule time is 7 or 8 hours. On the trip on which I was hurt the engine foamed before we left the yards at Pueblo and we had to stop still. At that time the caboose was not yet out of the yards. We stopped because water went down in the cylinders instead of steam. That condition continued all along the road. Whenever the oil is washed off the valves the valve becomes dry and hot and it will break if that condition keeps up. The reason this engine took 15 hours in going half the distance to Denver was because of the foaming and the condition of the engine. The engine was dirty when we left the terminals. It had foamed on the previous trip and we had reported it washed out and they did not wash it out. I do not know what the schedule was for the train we were running from Palmer Lake to Denver, but it was about two hours and a half, I think. With the engine in good condition I think you can make it in that time. I do not know the running time of our train, No. 631, from Pueblo to Palmer Lake. The whole time from Pueblo to Denver was 6 or 7 hours. It took us about 15 hours to go to Palmer Lake when we broke down. I was not relieved at Palmer Lake. When I stood on the sill step of the pilot on Engine 104 I held on to the hand holds on the boiler head, but it was generally hot when we are working along. I could not do the oiling from the platform in front of the boiler while the engine was in motion. The statement exhibited to me and introduced in evidence is signed by me. The claim agent asked me questions
51 and I answered them and he wrote them down. I wanted a copy and he said he would give it to me; but he did not let me have it. He sneaked out like a dog and would not let me have it. The claim agent asked me how the step was and I said the step was in good condition; but the ashes were on top. He did not ask me about the ashes and I did not put that in. I did not notice anything defective about the pilot. I was called to go out on the trip on which I was hurt between 6:30 and 7 o'clock in the evening and was called

to leave at 8:40. I reported for duty at 7:40. It is the rule of the Company to report for work one hour before leaving time. The Interstate Commerce Commission required you to be on duty 30 minutes before leaving time; and the rules of the Company require to be on the engine 30 minutes before that. That is done because a great many firemen will wait until the last minute and then do not have time to see to their engine and to see if the fires are clean.

Recross-examination:

I am not an engineer; I have not had any experience with valve yokes. I have never worked with one in my life, but I have looked at them. I have looked at cuts of boilers on paper; but what I know of them would not hurt anyone. I know positively that what I stated about what would make the water foam is the truth. I stated awhile ago that we ordered the boiler on Engine 104 washed out. I know that it was not done. I did not stay up all night to see, but I could tell it was not washed out by the way it worked, and because common sense will teach one that it was not washed out. Water will sometimes foam in a clean boiler. I say that the water foamed because the boiler was not clean because I have been around engines long enough to learn something about them. I know that the foaming water made that yoke break, notwithstanding what others say.

Counsel for Plaintiff thereupon announced that the plaintiff rested his case.

Defendant's Testimony.

Direct examination:

HARRY S. ARTIST, having been duly sworn, testified as follows:

My name is Harry S. Artist. I lived in Denver, Colorado, in December, 1910. My business is that of locomotive engineer between Denver and Pueblo, Colorado. The mileage between
52 Denver and Pueblo is 117 miles for freight trains. The passenger trains go to the Union Depot, which is 2 miles further. I am acquainted with the plaintiff in this case. I remember the accident to him about December 20, 1910. I was on the right side of the locomotive which I was running at the time in the cab. My train consisted of 11 cars and the disabled locomotive. There were four cars between the locomotive I was running and the disabled engine. They were freight cars. I picked up this disabled engine at Monument, Colorado. I could not say exactly what time of day it was; but it was in the morning. The disabled engine was on the left side of the engine from me when I first saw it. I do not know of my own knowledge where it was disabled. I first saw the disabled engine at Monument, where we picked it up, on the house track. We went in there and got it and put it in our train. We had to cut off this train before we got to Palmer Lake and go and flag a passenger train, and had to come back and make Palmer Lake.

I do not remember how long we were doing that. We had 11 cars outside of the disabled engine. We then went to Palmer Lake and went in the passing track to pass trains. I do not remember how many trains we met there that day; nor can I recall how far we went in that track from the South end. I cannot recall whether we stopped to pick up a brakeman or not; nor can I recall whether there was any other equipment already on that siding or not. I do not know how far I went into the siding, but I do know I stopped in a siding. That was at Palmer Lake. That was on the West side of the main track. Then we went on and picked up a car at Tomah. Tomah is North of Palmer Lake. It is the fourth station from Palmer Lake. I do not know where the plaintiff was hurt, except that I know he was hurt at Castle Rock. When we reached Castle Rock we went into the siding, probably 17 or 18 car lengths from the switch. The locomotive went that far. That would leave four or five car lengths from the end of my train to the switch. We went in that siding to pass passenger and freight trains and to unload some local freight. I do not remember whether we cut off any of the train there or not, but we went direct to the platform when we unloaded the way-freight. In handling the train there I made a service application of the air the way I always handle the train. A service application of the air is five to seven pounds pressure. I could have used as much as 60 pounds, but in that case you
53 only get the benefit of 20 pounds any way. I did make a stop while on the main line in order to make a switch. From the time we got to the switch on until we stopped again the train was probably going 3 or four miles an hour. When we came to a stop inside the switch I made a service stop. That means one application or service application of the air. Such stop does not knock or jar the train. I did not know mysef what was the matter with the disabled engine at the time. I did the switching that connected the disabled engine with my train. I do not know that I knew at the time the engineer on that disabled engine had left it: but I knew that the engine was in the hands of a messenger. I did not know who the messenger was. The plaintiff did not say anything to me before he was injured about where to stop. I did not talk with him.

Cross-examination:

I was the engineer on the front end of the train. I did not do the breaking or throwing of the switches, nor did I do any uncoupling, but just handled the engine. I did not get off my engine to pick up the disabled engine. There was some switching done at Monument and the conductor and brakemen did it and I handled the train. I was not on the disabled engine at any time. I could not state whether in going from Monument to Palmer Lake the disabled engine helped on one side or not; but I do know that in picking this engine up it gave me more than my tonnage rating. This engine did not help pull up the hill at Palmer Lake. I do not know whether the engineer was on it or not. I could not say whether anybody was on the engine until we got to Palmer Lake. I know that

the engine was disabled in going from Monument to Palmer Lake, but I do not know whether it was partially or totally. I do not know whether she helped any in going from Monument to Palmer Lake.

Redirect examination:

I say that when I took this engine in my tonnage was beyond my rating because I did not exactly know what this engine's rating would be dead. It did not help me pull any because it was not put in there for the purpose of pulling the train. I cannot say whether the engine helped or did not help to pull that train. It evidently did not help me because I had to cut off and return to Palmer Lake and flag a passenger train. I did not get any benefit from the engine if it was working; and if it had been working on one
54 side it certainly would have given me some help; and I will say I got no help from it. I am now living at Denver, Colorado. I have been dismissed from the Santa Fe Company and am not working for any Railroad Company.

Recross-examination:

I was dismissed from the Santa Fe on the 20th day of August, and the accident for which I was dismissed occurred on the 10th day of August. I still live at Denver and will live there until I get located some other place. I am now being paid engineer's time in coming from Denver down here, and I am on the Santa Fe's payroll for that purpose at this time. I do not know anything about going back on their payroll when I get back to Denver. I am on the payroll now and am receiving expenses in addition to my wages. I am getting about $2.75 per day expenses. It is the agreement that we be allowed $5.55 per day and expenses, but there is no specified amount of expenses. I can put in what I eat and sleep for expenses. I do not intend to put in anything except what it costs me to eat and sleep. I do not remember the name of the hotel where I am stopping, but it is near the Depot. I am not stopping at the St. Regis or the Sheldon.

Redirect examination:

I said that I am to get engineer's wages while I am down here and I am on the payroll for that purpose. I mean by that I am on the payroll as a witness. My expenses are to cover meals and room and nothing else. The Company pays me $5.55 per day because that is the amount to be paid under the engineer's schedule of wages for attending law suits. That is equal to 100 miles per day. 100 miles is supposed to be a day's work, and that is where I get the $5.55.

Recross-examination:

I am not in the employe of any railroad. I came down here on a pass.

Defendant's Testimony.

Direct examination.

GEORGE MEISTER, having been duly sworn, testified as follows:
My name is George E. Meister; and my business is that of an engineer on locomotives. I am now working for the C. & S. and the Santa Fe jointly out of Denver, between Denver and Pueblo.
55 I remember the occasion of the accident to Claude Swearingen on the 20th of December, 1910. I was engaged at that time as a locomotive engineer from Pueblo to Denver. It is 117 miles from Pueblo to Denver; and it is about 44 miles from Pueblo to Colorado Springs. The route between Denver and Pueblo is not divided into freight sections. I have made round trips from Pueblo to Colorado Springs and return. The grade from Pueblo to Colorado Springs and on up to Palmer Lake is uphill and a great deal of it is down hill and some of it is level. The freight running time from Pueblo to Colorado Springs is based on 10 miles per hour. I cannot say that that is the usual running time, as that depends on the train and the engine we have and the conditions that govern us winter and summer. The grade is heavier from Colorado Springs up to Palmer Lake, but it is based on 10 miles per hour. I made a trip on the 20th of December from Pueblo to Denver. I had a freight train, but I do not remember how many cars I had. I was called to leave Pueblo on that trip at 8:10, but I left about 8:35 or 8:40 in the evening. From that point on we had a fairly good run. It was an average run, until we had the breakdown. We broke the valve yoke half way between Monument and Palmer Lake. Up to that time we broke the valve yoke we had a fairly good run considering the amount of time we were delayed, and we averaged close on to twelve or thirteen miles per hour. We broke the valve yoke between three and four o'clock in the night or early morning. I did not notice just what time it was. That was about seven hours and a half after I left my terminal. I had traveled at that time 63 miles or close to it. I remember being delayed about an hour at Colorado Springs taking coal and water and making up a train. Not taking off any time for delays our time would have been about seven hours and thirty minutes." We had one hour delay at Colorado Springs, and delays also at Pring, Pinion, and Fountain and Monument. Monument is further up than the other points named. It is about 12 miles from Pueblo to Pinion and from Pinion to Fountain about 24 miles. We took water at those places and then took water at Colorado Springs. It is about 21 miles from Colorado Springs to where we had engine trouble. I was on the engineer's side of the engine seated on the seat-box when the trouble happened to us, between the stations of Monument and Palmer Lake. We had gone
56 about 2 miles from Monument. When the trouble occurred I tested the engine to try to find out which side the trouble was on. I then removed the valve on the left side when I discovered that it was not broken. I then disconnected the right side. When I found that the right valve was broken I then backed

into Monument. I had no help backing into Monument. It was downhill and I only had two miles to go. I backed into the side track at Monument and I did that without help: There was no work to be done by the fireman going back to Monument except to look after the fire and see that there was sufficient water in the boiler. When we got back to Monument the firemen assisted me, I believe, in disconnecting that valve or trying to block it. I do not know how long it was from the time I had this accident until I got back on the siding at Monument, but I judge it was about 45 minutes. When I got back to the siding at Monument I would say it was about eight hours and twenty minutes since we had left Pueblo. At Monument the engine was left there. I disconnected the valves on both sides and the engine was prepared to be towed into Denver. After that engine was disconnected on both sides it was in no condition to help any other train. It was a dead engine and could not be moved by steam. That engine after that did not help pull another train to Denver, because both valves were disconnected. After I left the fireman stayed on the engine to lubricate the valves of the cylinders. All he had to do was to keep water in the engine and keep fire in the engine. About 10 pounds would have been enough to lubricate the valves. I was on that engine until we got to Palmer Lake. From Monument to Palmer Lake the engine did not work any. I got off the engine at Palmer Lake to go home. I made a statement to the plaintiff at Palmer Lake as to what he should do. I told him when the engine got to groaning and when they stopped to oil the cylinders through the indicator plug holes. I did not tell him to go out on the pilot to be ready to jump to oil it immediately upon stopping. I did not say anything with reference to being ready, "out there" to oil it. I said "Be ready to oil it." I never said to be ready "to be out there." I said when the engine got to groaning, and when they came to a stop to oil the cylinders through the indicator plug holes. I did not direct him to stand anywhere. I did not anticipate he would stand on the step in front of the pilot. I went to Denver on a passenger train. I went from Palmer Lake to Castle Rock without him. I found him at Castle Rock in his injured condition
57 and I went with him from Castle Rock to Denver. My train was behind him until I got to Castle Rock. Denver is the repair shop for this engine, and it was the nearest repair shop for the engine from the place at which it broke down. I do not know the number of the train or engine that picked my train up that I had been pulling; but my train was picked up by another merchandise train; that is, the perishable parts of it were picked up, or rather the cars which contained perishable merchandise. I did not order this engine which broke down washed out when I went into Pueblo the night before. The source of supply of water for engines is the same as that of the city, at Pueblo. I do not know exactly where the water comes from, but I suppose it comes from the Arkansas River, as I know of no other water in that vicinity. That water requires treatment. It is the business of the fireman while en route on freight trains to attend to the treatment of the water. Claude Swearingen was the fireman on the trip in question, and he was also

the fireman when the engine came into Pueblo on the trip before. We arrived in Pueblo, on the run previous to the run in question, at 4:35 on the morning of the 19th; and we left there at 8:10. That would have given us 16 hours and 35 minutes in Pueblo between the previous run and the run in question. When I got into Pueblo at 4:35 on the 19th I reported my work, washed up, took the engine around to the round house and went to bed and to sleep. Later on I was called and went to the Santa Fe depot for the purpose of an investigation. The plaintiff met me there. I do not know exactly how long I was there, but the plaintiff and I were there at the same time. The investigation lasted about an hour and a half, I suppose. I believe the plaintiff left the investigation with me. I had eight hours rest that day. I had all the chance in the world to get 8 hours rest; it was up to me to get it. I was called to leave Pueblo for Denver at 8:10. We proceeded to Pinion and there took water. We had a little trouble with the engine when starting out from Pueblo. There was nothing the matter with the valve yoke when we started out. The valve yoke is a square yoke that sets over the valve. Its size varies according to the size of the engine and the size of the valve. It might be 12 inches long or it might be 8 inches long. It might be 7/8th of an inch thick or 3/4 of an inch thick or two or three inches wide, according to the size and construction of the locomotive. After taking water at Pinion the engine foamed
58 a little bit until I blew it off. The usual way of blowing off an engine is by opening up the blow-off cock. That settles the water in the boiler. At Fountain we took water again, but I cannot recall whether the engine foamed there or not. If it had foamed again I would have opened up the blow-off cock. There is a way of lubricating the engine while in motion. It is done by the lubricator which is worked by steam. You set the lubricator according to the amount of oil required to lubricate a certain area of the valves and cylinders. I cannot say just how long it takes to get the lubrication into the cylinders from the lubricator; I never heard anyone say; but I should judge a couple of minutes. I think I could have oiled this engine in a couple of minutes no matter from what cause it became dry. It had been some 40 or 50 minutes before this yoke broke that we had had trouble with the water foaming or trouble of that kind; and the engine had been working all right from the time we had trouble with engine foaming up to the time the valve yoke broke. When the valve yoke broke we had had no warning of any kind that it was going to break. If there had been anything present to bring about this bad condition I would have known it; and as an engineer, considering the fact that we had had no foaming water for 40 or 50 minutes before the break-down, I cannot tell what broke that valve yoke. The first thing I knew about the breaking of the valve yoke was when it broke. I knew then that the break was in the valve gearing some place and I then proceeded to find out which side it was on. There was no way to see inside where the yoke was and I disconnected the wrong side. That took me about ten minutes. Then when I discovered I had disconnected the wrong side I connected that back and disconnected the other

side and ran downhill back to the next switch. The water at Colorado Springs is good water. I guess it is better than ordinary water as it is considered the best in Colorado. The water at Pinion is the same as at Pueblo; it is treated. The water at Fountain is treated also. There is water in that country to be used for engines that is not treated; but none in the three places named. The water that needs treatment contains foreign matter and alkali. All engines entering Pueblo use this same water. I think all roads entering Pueblo use this same water.

Cross-examination:

59 The water they now use is the same water they have always used since the road has been in operation. It has not been changed that I know of. I was in charge of the engine at the time in question. The treatment of the water was done with a compound. They put so much of this compound. I do not know just the amount to be used, in the engine tank. It is mixed up with boiler water in a bucket with the squirt hose and poured into the tank and of course, it is mixed thoroughly through the water by the movement of the engine. The treatment varies; some use more and some less. The engineer directs the fireman in his duties; but the treating of water has been carried on so long that a fireman who has been on that road several days knows when to treat the water. I was the engineer and I am the man who knows when the water needs treatment from the way the engine works; and if the fireman keeps on treating the water and the engine keeps on foaming it is something else besides the water that needs treatment. When we had gone about a train length and a half or two train lengths out of Pueblo the engine started to foam and we stopped right there on account of the grade. I was standing right at the end of the yard when I started, but I do not know how much of my train was still in the yards when I started, but some of it was. That was the first time we had to stop because the engine foamed. I did not tell the fireman to treat the water because we had treated it before we left the roundhouse; and there was no use to treat it because we had already put the required amount in for that tank of water. I did not tell the fireman right then that I had ordered that engine washed out and here *is* was not washed out yet. The engine did not foam the trip before; we made a pretty good run. We were out on the previous trip about 10 hours. It is not a fact that we were out on the previous trip 15 hours. I have my time book in my pocket. The time book I hand you is the time book I had at that time. I was before an investigating committee after the previous trip. I believe that investigation concerned the delay that the engine in question caused to a passenger train. The passenger train was delayed on account of the engine in question, No. 104, foaming and lacking steam. When an engine foams we have wet steam, but not a lack of steam. Wet steam will not run an engine as well as dry steam. If an engine foams you will have wet steam, which means that the water raises with the steam and washes the oil off the valve

yoke; and just as fast as you throw oil on the valve yoke the
60 boiler water will run in and wash it off; and that will make the yoke hot; but I do not know that it will cause the yoke to break. The yoke works between two surfaces, and if you have nothing there but water the yoke will expand with friction; and when it expands it will stick and break. This engine, 104, on the trip before foamed and delayed a pasenger train. We were out ten hours and 50 minutes on that trip. I do not know that this plaintiff here went to that investigation after I left; I do not remember whether he did or not. I do not know that I went there at 9 o'clock or not. I do not remember when the plaintiff came from the investigation; but I know when I came out. I had been to bed that morning when I was called; but I do not know whether the fireman had been to be- or not. He was called for the investigation and he came. The run which we made just before the run on which plaintiff was injured was from Pueblo to Colorado Springs and return. It was not to Denver, but what was called the turn-around. It is forty-three miles and some tenths from Pueblo to Colorado Springs, and 88 miles for the round trip. We were called to leave Pueblo on the 19th at 8:10 P. M., and I had to report thirty minutes ahead of that time to be on my engine. It is a requirement of the Federal government to be on duty 30 minutes ahead of leaving time; but it is not a requirement of the Company to be on duty thirty minutes ahead of the time required by the Federal Government. Firemen do not have to report an hour before leaving time. I was called to leave town at 8:10, but I do not know when I went on duty. The fireman was called for the same time, and he would have had to be there 30 minutes before that time, which would have been 7:40. He would have been called to report at 8:10 and would have had to be on hand at 7:40 to get his engine ready to go out. I did not say the foaming began immediately after I went out of the yards with the train, but I said it began at the beginning of the trip. We were delayed there only long enough to stop and start out again. We did not have to draw a new supply of water, as the injector was working all the time and that throws it in; and when I blow off my engine it does not reduce the steam, but just blows out the water. I do not remember when I next came to a stop on account of the engine foaming; but I believe I slowed down once after that but I do not remember where it was. I won't say that I came to a full stop; but while I was blowing off the boiler the train came
61 almost to a stop. I do not know of any other time I stopped on account of foaming water. The water was just the same except that I blew the boiler out. The water settled down when I blew it out. The chemical condition or the elements of the water were not the same as they were before because I blew the engine out. I do not blow out all the water when I blow the engine out. Some of the same kind of water I blew out was left in the boiler, but that I blew out was replaced with fresh water. The water that replaced the water blown out was not dirty. The water that came out of the tank had compound in it; but I suppose that the heat of the boiler destroyed the strength of the compound, but I am not sure about

that. The compound is used there to keep the water from foaming. The water in the engine was the same as the water in the tank as it came from the tank. I cannot say that the engine was dirty and needed washing out inside and I cannot say that I reported it for washing out on the trip before. I kept blowing it out because it was dirty and there was sediment in it. The sediment came out of the water, the same as it does in other engines, and that water will do the same to all engines. I do not mean to say that no amount of washing will do a boiler any good; nor do I mean to say that a passenger train will break down anywhere going to Denver and make only three or four miles an hour. I do not know the number of the train we were running. It was a merchandise train and I think it was 631 Extra. I received that train at Pueblo and was going to Denver. I do not know where it came from. The next freight division before getting to Pueblo was La Junta; and the next division prior to that is Dodge City now; but I do not know what it was at that time. Dodge City is in Kansas. The average time for trains from Pueblo to Denver is 10 miles an hour. If I had train 631 I had a schedule time to make, but I do not know what that time is; but it is faster than 10 miles an hour. I do not know whether or not the time was between 7 and 8 hours, or whether the schedule was 15 miles an hour. When the valve yoke broke I just started the engine; I did not have to work her I just opened up the throttle to get the engine started and the engine ran back against the cars and that started the train back down hill. I do not remember how long we remained at Monument until we were picked up; but it was eleven something in the morning when we were picked up. We were there from about four o'clock in
62 the morning until eleven, which would be about seven hours we remained in the siding. We remained there so long because there was no other train to pick us up and take us to Denver. Several passenger trains passed us there. We did not have any orders. We could not get any orders to move, nor did we know when we were going to get orders to move. I worked on the engine and Swearingen was right there with me. When we backed up to Monument I started the engine and Swearingen kept the engine hot. In going from Monument to Palmer Lake the engine did not require any firing; but he kept up steam and was on duty as a fireman. At Palmer Lake I quit the engine and my 16 hours were up and I asked to go to Denver. I did not make the fireman stay on. If the fireman does not obey me he would lose his job. The 16 hours had expired as to the fireman also. I waited for a passenger train and the fireman went on with the train that picked us up. I had no right to stay with the engine unless I wanted to. I did not tell the fireman we were dead as cheerful as counsel said it. I knew when my 16 hours were up that I did not have to work any more. I do not remember just when the passenger train came along that I boarded; but it came along in a few minutes after the fireman left with the engine. I then proceeded to Castle Rock and at that point they put the fireman in the baggage car with his leg cut off. I heard of the accident before I got there. When I say I rode

on the passenger train with the fireman I mean that I rode in the baggage car with him. I told the fireman when he heard the cylinders groan to oil them, whenever they came to a stop. If I waited until the cylinders groaned before I oiled them, they would not necessarily get very hot. They would get hotter than that if they had no lubrication. I oil the engine at all times. I cannot say what caused the valve yoke to break. There certainly must have been grease on the valve yoke because the lubricator was working. I did not look at the valve yoke to see if it was broken. I do not know that Engine 104 was afterwards condemned, nor do I know if she was condemned before that time. When I got to Denver I was discharged the next day. I do not know why I was discharged. In about 10 days I went to work again. I do not know when the claim agent got the statement from the plaintiff. I do not know if the claim agent had a talk with plaintiff. I know the claim agent came to El Paso with me and the other engineer; and he asked me to come down here as a witness. I have
63 stayed in the employ of the Company since I was re-instated up to the present time, and I am still in their employ. I do not know why they pulled me out of the service; I just know I got a message to go back to work. The valve yoke did not break about 9 or 10 o'clock in the morning. The conductor was released at Monument and the train crew were released at the same place. The engineer and fireman were also released from duty with reference to the freight train, but not with reference to the engine. The train crew were released and went in on the freight train that picked up the merchandise train I had handled that far. I do not know how long that was after the valve yoke broke; but it was after we had come to Monument. I think it was about an hour.

Redirect examination:

The train crew on our train was released at Monument and the fireman must have been released also. That was just about break of day, about the time 606 came by there. I got two or three messages at Monument, but I believe the company wired that everybody was released. When we were leaving Pueblo our water was foaming and I stopped the train just long enough to stop and start the train again. From there on my engine worked all right for a little while and then it began to foam again. The only trouble I know of about my engine was the water foaming. It took just a couple of minutes to get rid of the foaming water. I would blow the engine off and it would settle right down. Foaming water is a frequent thing on all railroads that run out of Pueblo and wherever they have bad water. There was nothing about that that indicated there was something wrong with the valve yoke. If there was anything about the valve yoke that was wrong the engine would have gone a little lame, and I would have known it at once. It had been some 40 or 50 minutes before the breakdown since I had had trouble with foaming water; and at the time of the break down I should think the engine was about half cut off. Previous to that time she was working all right. Of course, when we broke one side

that side was out of business and we stopped and disconnected the engine. We had some little trouble with water foaming going out of Colorado Springs; and I increased the supply of valve oil to correct that. It generally takes a couple of minutes to overcome the trouble with foaming water. I did not run that train with a broken valve yoke from Pueblo to where we stopped. That valve
64 yoke, so far as I knew, was in good condition. I had no other trouble except with foaming water.

Recross-examination:

I increased the supply of valve oil to lubricate the valves quicker in order to keep them from burning and to cut down the friction. The foaming water washed off the oil from the valve yoke and I had to increase the supply of oil. We are entitled to three pints or 3½ pints of oil from Pueblo to Denver. I mean that the Company gives us that much, and if we use more than that we get into trouble, especially if a Galena man is around. We never use more than we can help. When we started out we had an excess. It is a fact that when we started out I said to Swearingen "we have only got a pint of oil," and Swearingen crawled out over the tank and across the box cars and went and got some more. I did not — a supply of oil when we started; but I discovered we were out when we started. The lubricator was already full at the time. The steam expands and -rives the valve yoke back and forth, and if there is no oil there it will start friction, and friction will make the valve yoke expand and make it hot; but whether it breaks depends on whether there is much or little play between the valve seat and the balance plate. It is true that when I went down to the steam chest I told Swearingen to work the reverse lever. He could have moved it because I moved it myself to reverse the engine afterwards. I disconnected the engine on one side and then connected it up. I did not take the oil can and go down and grease the engine. I only greased the engine through the lubricator. I started the lubricator running when I was sitting there starting to back up. While the engine was standing still the foaming water was not at work on the valve yoke. The lubricator was shut off, I believe; but I do not know it.

Redirect examination:

I did not intend to leave Pueblo without oil. It is the supply man's business to put oil in the engines. The lubricator held a little over three pints. The lubricator was full of oil when we started out. We got the additional supply of oil for an emergency, as some times when the engine is foaming we will increase the supply of oil. I suppose we had about 6 or 7 pints of oil when we left the shop. When I quit and left this young man (the plaintiff) in
65 charge of the engine I left him about a lubricator full of oil. My engine was not needing oil when the valve yoke broke.

Recross-examination:

When I say that we were released from that train on which the valve yoke broke, I mean we were released from the pulling of that

particular train and were released from road duty; but I cannot say that we were released from attending to that engine and bringing it home to Denver. Swearingen was released at Monument as fireman, but he was not released as a messenger, but was kept on duty for that engine.

Whereupon counsel for Defendant offered in evidence the ruling of the Interstate Commerce Commission which had been plead. There being no objection the Court directed same to be admitted and made a part of the record. Same was marked Exhibit "B" for identification and is referred to as such.

Whereupon counsel for Defendant announced that it had closed its case.

Plaintiff's Rebuttal Testimony.

G. HAILS, having been duly sworn, testified as follows:

Direct examination:

My name is G. Hails. I live on North Virginia Street in El Paso. My business is locomotive engineer, and I have been such for 16 years. I can give an opinion as a locomotive engineer as to what is the cause of a valve yoke breaking on an engine when it is in operation. Bad water will cause a valve yoke to break. What I mean by bad water is alkali water or water that has been in *that* a boiler that has not been washed out. Such water causes wet steam and it washes the oil off the valves and there is no lubrication. That has happened to me more than once, and I have broken valve yokes. When an engine foams it is not because there is too much water in the boiler but because the water is dirty and full of alkali; and that water will go out with the steam, and your locomotive isn't made to work water. Washing the boiler gets all the dirt and alkali out. If you have clean water in the boiler you will have good dry steam. Dry steam is essential to the valve yoke as it will not take the oil off the valve surface. The way to prevent foaming is to wash out the boiler or by blowing the bad water out occasionally.

66 Want of oil on the valve yoke will not make any material difference; but if you do not have oil on the valve seats the valve will stick to the seat and then the valve rod or eccentric would break. It is necessary to have lubrication on the valve seat to keep the metal apart so they will slide. Steam working will not have any effect on the valve yoke unless the valve is clamped to the seat; and if that happens something will break.

Cross-examination:

I worked as an engineer on the G. H. & S. A. It has been 4 years since I worked as engineer on the railroads. I have been shift engineer out at the cement plant for the past year. I do not run a train of any kind there. I was discharged as railroad engineer. There are plenty of railroad engineers who are actually working who are running into El Paso at this time. This case was mentioned to

me first a few moments ago by Mr. Johnson, counsel in the case. I did not know anything about the case and I did not know what the issues were. The only thing Mr. Johnson asked me was whether I could give expert testimony. I worked for 16 years between Del Rio and El Paso as an engineer. The reason I broke valve yokes was because the Company was so stingy they did not furnish sufficient lubrication. I possibly did not have to break them; but it might have been done on account of bad water. I possibly might have saved those valve yokes if I had had sufficient lubrication. You can break valve yokes by getting them dry. Any engineer can put oil in the valves and on the valve seats if he is not working too much water at the time. The oil will flow down right away; and if you get rid of the surplus water there will be no trouble. I pulled a passenger train out of here. I often took water at Fabens. I do not know whether it was treated water or not; nor do I know whether the water there has been treated for ten years or not. I did not run there before they treated it on the passenger trains; but I did on the freights. That water foamed every time we put it in the engine and we used dope in the tank and in the boiler too. The dope was given the engineer to put it and they did not expect the fireman to do much over there. The dope would keep the water from foaming for a certain time. We would mix it up in a bucket and put it in the tank and it would hold the water down for a while. Bad water like that at Fabens will not foam, no matter how clean your engine is; it won't foam when you first get the engine. There is a sediment that makes the water foam; and it is the properties
67 in the water that makes it foam. When the water begins to foam and you blow the engine off that gets rid of a part of the foaming. You can get along with that water by frequently blowing the engine off. You turn on your blow-off cock and get rid of that water and that has a tendency to stop it from foaming. The oil from the lubricator goes into the valves at the rate of three drops a minute. If you blow the water off and stop the foaming and stop the water from going into the valves and let your oil in everything will be all right. If you went 40 or 50 minutes without the water foaming and the lubricator was running, oil working, no trouble with the engine, I would say that the engine was all right, of course. An engine is all right as long as the valves are lubricated. I think I know what a valve yoke is. It is a good thing until it breaks. No one can tell it is going to break in advance; but you can tell when a valve gets dry and one can figure it is going to break when it does. All the harm the water does is temporary as long as it runs through and does not interfere with the lubrication; and when you stop the water and let in the oil it is in good condition. It is possible to break one valve yoke and not know it at that time and then break the other. You can break one yoke and go along a good ways before you break the other. I have broken part of the valve and not the other valve, and then the engine became as we say, lame, the valves were not square. Up to the time it became lame we kept on running. If you have a temporary infusion of water, and you get rid of that by opening the blow-off cock or some

other means, you will settle the water and get rid of that flooding of the cylinders. A great many roads have to treat their water. I find that most every road in the West has to treat their water; and they have to put this compound or dope in the water at intervals along the route. I have done it between here and Sanderson and between here and Valentine when ever my water begun to foam; and it is done to tone down the water and keep it from foaming. They have nearly always used that compound on the Southern Pacific.

Redirect examination:

If an engineer has water in good conditon there is no necessity for him to work it over on his valves; but it is not necessary for him to have water that foams to have water on the valves. If the engi-
neer has dirty water he need not break the engine if he uses
68 proper care. He will have to use proper care with any kind
of water or he will break something. It is just a question of care on the part of the engineer, even with dirty water, to keep from breaking the engine. If an engine is foaming that has been out on a trip for about ten hours, and the engineer had to blow off his boiler and could not make time and is delayed along the route and finally, between stations, the engine comes to a dead stop and the engineer goes down and disconnects one side and asks the fireman to work the reverse lever and he cannot budge it, I would say that the valves are stuck on account of lubrication or want of lubrication. The lubricator runs by steam and runs at the rate of three drops of oil per minute. The more oil that is put on anything the more it lubricates it.

Recross-examination:

The engineer could flood the oil all he wanted to. The oil in the lubricator runs through a metal point, but the engineer could have a stream running through it. Three drops a minute is the amount usually run through when everything is working normally; but if the valves are dried out the engineer can increase the flow of oil to any extent, but he has to be careful. If the yoke was broken it would not necessarily prevent the working of the reverse lever, as the lever would not have the valve to pull. The yoke is a square casting that goes around the steam valve in the steam chest. If the yoke were already broken lubrication would not effect the working of the reverse lever on that side, but there is another valve on the other side. If one valve yoke was broken that ought not to effect the working of the reverse lever unless the valve was cocked in there some way. The valve yoke could not get cross ways; but it might get out of plumb or interfere with the free working of the lever back and forth.

Redirect examination:

If one valve is stuck the other might be stuck or might not be stuck. The reverse lever pulls both of the valves and if the broken one has no action the other one has none either.

Recross-examination:

If the engineer disconnected one side and tried to work the reverse lever and found out he had disconnected the good side, I would tie a can on him for that, as he could tell which side
69 was broken by giving the engine steam. You could do that even though the engine were stopped dead, as the engine stopping does not kill the steam. I have broken valve yokes, but I was discharged for something else.

Whereupon both side- announced by their attorneys that they rested their case.

EXHIBIT "A."

DENVER, COLO., 1, 7, '11.

(Signed) CLAUDE SWEARINGEN.

Statement of C. V. Swearingen.

Age 28 years, residence 917 Court Street, Pueblo, Colo. Fireman on the Joint Track and have been so employed since Dec. 20, 1907, and prior to that I worked in the Round House for four years. On Dec. 20th, 1910, I was on engine 104 Moffit from Pueblo to Denver, train No. 631. We broke a valve yoke between Monument and Palmer Lake and we were pulled back to Monument and they switched us around and got the engine in the middle of the train, and started for Denver with us. The engineer, Mr. Meister, got off at Palmer Lake and said he was going to deadhead in on 607 and left me in charge of the engine after being on duty 17 hours and 15 minutes, with the instructions to oil engine when I got a chance. We were pulling in the side track at Castle Rock and the train was very near stopped and I went out over the left running board and down onto the pilot and slipped in some way and got my left foot in under the pilot and I could not pull my foot out before the pony truck caught and one wheel run over it. I was on the left side of engine when I fell and the opposite side from the depot at Castle Rock when I fell. I was on the little step on pilot when I fell. The foot step, as far as I know, this step was in good condition. There was no snow or ice on the pilot of engine at the time. The wheel of engine that ran over my foot just made half a turn after it ran over my foot. They applied the air just before I slipped off and there might have been a little jar, when the slack run in. I was alone at the time and no one saw me fall until I got on the other side by crawling over between the engine and car ahead of me and holloaed. I do not blame the trainmen who were handling the train at the time. I blame the Railway Company for asking me to do the work of an engineer after being on duty 17 hours and 15 minutes, when I am not qualified as an engineer. I do not know who gave the engineer permission to leave the engine, but he
70 instructed me to look after it. There were no defects in pilot that I know of that would cause me to fall, there was a

little dirt on the foot board or step on engine. The engineer had taken out a couple of plugs in the cylinders and he told me when I got a chance to put oil in there and I was going out for that purpose when I was hurt. The engineer did not tell me that the oil would be put in while the engine was moving, but I went out expecting them to stop as they were very near stopped when I left the cab of the engine. When I fell, my foot hit the ground and was caught by the pilot and turned over and I could not pull my foot out. When my foot was under the pilot my body was lower than my foot, and I suppose this would interfere in some way of my getting my foot out. The pilot on this engine was low enough that when my foot went under it, it scraped the skin off my leg.

I have read the above statement and find the same to be correct to the best of my *knodgle*.

(Signed) CLAUDE SWEARINGEN.

EXHIBIT "B."

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and which could not have been foreseen."

Any employe so delayed may therefore continue on duty to the terminal or end of that run. That proviso quoted removes the application of the law to that trip.

"Rule 88, published by the Interstate Commerce Commission in a pamphlet entitled "Conference Rulings of the Interstate Commerce Commission, adopted June 25, 1908 and issued April 1, 1911."

UNITED STATES OF AMERICA,
Western District of Texas:

I, C. E. Pinckney, do hereby certify that I was the official court stenographer for the United States District Court for the Western District of Texas on the 27th and 28th of Sept. A. D. 1912; that I made on said dates a shorthand report of the evidence, exceptions, etc., in the case of Claude Swearingen vs. Atchison, Topeka & Santa Fe Ry. Co.; that the above and foregoing 51 pages is a true
71 and correct transcript of my said shorthand notes in narrative form, including all evidence, verbal and written, motions, objections rulings of the Court, exceptions, etc.

C. E. PINCKNEY.

And the foregoing constitutes the testimony and statement of all the evidence introduced or offered on the trial of this cause. Both parties rested and the case was argued to the jury by counsel for the respective parties.

Be it further remembered that after the argument of said cause by counsel, the court gave to the jury the following charge:

"GENTLEMEN OF THE JURY: In this case the plaintiff alleges that he lost his leg through the negligence of the defendant company. He named several acts and omissions on the part of defendant and says that each of them constitute negligence causing or contributing to his injury. One of these is that the defendant required and permitted him to be on duty on an engine for a longer period than sixteen hours; another is that defendant placed the disabled engine near the back end of the train instead of near the front end, and that the train was stopped and started with an unusual jerk, throwing plaintiff from his position on the pilot; still another is that the sill step of the pilot on the engine which injured plaintiff was placed inside of the rails and should have been outside of the rails, and was too narrow; and last is that cinders were left on the track and the same were so high and the sill step was so low that the sill step caught them and made his footing insecure.

"Now the defendant answers with a general denial and pleads three special defenses: First, that plaintiff contributed to his injury by negligently going on the sill step while the engine was in motion; Second, that he assumed the dangers and injury incident to going or climbing about the engine while the same was in motion; and lastly, that if he was employed for more than sixteen hours at the time of his injury, such employment beyond sixteen hours was due to the sudden breaking of the valve yoke on the engine, and that this breaking of the valve yoke was a casualty, and that the cause of its breaking was not known to defendant or its servants at the time when the plaintiff left the terminal on the trip on which
72 he was injured, and that same could not have been foreseen.

"You are instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person, under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. (See 95 U. S. 441-2.) Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours, and subject to the instructions that will hereafter be given on this phase of the case, you are charged that if you believe from a preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which is occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time, or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow; or that there was negligence in allowing cinders (if any) to be caught on the sill step where plaintiff was standing; then in any one or more of such events the plaintiff may recover. If the defendant was negligent in none of these particulars you will find for the defendant; and further if the injuries of the plaintiff were the result of a mere accident without fault or negligence on the part of the defendant then the plaintiff cannot recover. Every servant is held to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open

and apparent to him. If, therefore, you believe that the dangers and injury in this case were such as are ordinarily incident to the employment of a fireman, or were open and apparent to him, the plaintiff cannot recover.

"As to the defendant's plea that plaintiff negligently contributed to his injury by going on the pilot while the engine was in motion, you are charged that, although you may believe that plaintiff may have been guilty of negligence by so going on the pilot while the engine was in motion, such fact will not bar the plaintiff from a verdict in his favor if the defendant was also negligent. But in this event you will diminish the plaintiff's damages in proportion to the amount of negligence attributable to him.

73 "Now as to the Sixteen Hour Law: By Sec. 2 of the Act of Congress of March 4, 1907, entitled 'An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' it is provided:

"'That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.'

And Sec. 3 of this Act makes it an offense to violate Sec. 2, but contains a proviso as follows:

"'Provided, That the provision of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.'

"The plaintiff was required to be on duty from 7:40 P. M. on December 19th to the time of his injury at 1:25 P. M. on December 20th, 1910, a period of more than sixteen hours. The evidence is undisputed on this point. It is immaterial whether, after the valve yoke broke, the plaintiff was a fireman or a messenger, whether he was on the road or on a sidetrack, he was continuously on duty. The only question is: Was he required to work over sixteen hours on account of a casualty or a cause not known to and unforeseeable by the defendant or its servants at the time he left Pueblo? You are instructed that a casualty proceeds from an unknown cause, or is an unusual effect of a known cause. It may properly be said to occur by chance and unexpectedly (See 139 U. S. 86). No act or result that could have been guarded against or prevented by ordinary care and foresight can be denominated a casualty or an unknown and unfor-seeable cause, as these terms are used in this Act of Congress. If you find then from a consideration of

74 all the evidence that the breaking of the valve yoke as pleaded by defendant was a casualty or unknown and unfor-seeable

cause, as provided by said Act of Congress, then you cannot find negligence in the fact that plaintiff was required to work more than sixteen hours, but you may look to other facts in evidence, if any, to determine whether defendant was guilty of negligence causing or contributing to plaintiff's injury. If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unfor-seeable cause as it provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours And if in the breaking of the valve yoke you find no casualty or such unknown and unfor-seeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, and then the plaintiff can in *on* way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt.

"You are instructed that as to his allegations of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence; but touching the allegations as to assumed risk and contributory negligence and the existence of a casualty and unknown and unfor-seeable cause, as pleaded by the defendant, through which plaintiff was required to work over sixteen hours, the burden of proof rests upon the defendant.

"You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony and you may give it such weight as you deem it entitled, under all the circumstances, to receive.

"If, in view of the evidence and instructions of the court, your verdict be in favor of the plaintiff, you will award him such amount of actual damages as will compensate him for the injuries he has sustained; and in arriving at that sum you will take into consideration the character of his injuries, whether permanent or
75 otherwise, and his diminished capacity to earn money in consequence of such injuries as well as for the pain and suffering he may have endured in consequence of the same.

"If your verdict be in favor of the plaintiff you will return it in the following form: 'We, the jury, find for the plaintiff and assess his damages at — dollars,' you to fill up the blank with the amount awarded him. If, however, your verdict be for the defendant, you will simply say, 'We, the jury, find for the defendant.' "

To which charge the defendant in open court and while the jury was still in Court and had not retired to consider the verdict, made the following exceptions to the Court's general charge to the jury in the above entitled and numbered cause:

"First. Defendant excepts to the following words of said main charge: 'Passing for the moment the question of negligence in re-

quiring plaintiff to work over sixteen hours and subject to the instruction that you will hereafter be given in this phase of the case.'

"The quoted paragraph is excepted to for the reason that the same assumes, independently of any further language in connection therewith, that the defendant was in some manner negligent under the Sixteen-hour Law, or the Hours of Service Act.

"Second. Defendant excepts to the following language of the main charge: 'That if you believe from the preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury or in the manner of handling the same by the engineer Artist at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sill step where plaintiff was standing, then in any one or more of such events, the plaintiff may recover."

"Defendant objects to the quoted parts of said main charge for the reasons that the court tells the jury that plaintiff may recover.

(*a*) If there was negligence on the part of defendant in placing the disabled engine where same was placed in the train; or

(*b*) In the manner of handling the disabled engine by the engineer Artist; or

76 (*c*) If there was negligence in placing the sill step inside of the rails; or

(*d*) In making it too narrow; or

(*e*) Allowing cinders to be kept on the sill step where plaintiff was standing;

that then, because of the existence of any one or more of said conditions plaintiff could recover, notwithstanding one of the same, or all of same, though negligently placed or permitted, had nothing to do in fact with causing the plaintiff to fall from the pilot of said engine.

"Third. Defendant excepts to the following language of the court's main charge: 'If the defendant was negligent in none of these particulars, you will find for the defendant.'

"Defendant objects to this language in the main charge because no verdict can be rendered for the defendant unless the jury are able to find that the defendant was not negligent in any of the particulars named, notwithstanding none of said conditions contributed to or brought about plaintiff's accident which caused him to be injured.

"Fourth. Defendant objects to the following language in the court's main charge to the jury: 'And further if the injuries of the plaintiff were the result of a mere accident without fault or negligence on the part of either the plaintiff or the defendant, the plaintiff cannot recover.'

Defendant objects to this language in the main charge because it makes the defendant liable unless the jury are able to find from the evidence that the plaintiff was not guilty of negligence, when, as a matter of law, if the plaintiff was guilty of negligence in some

manner or respect not excusing him and wholly disconnected from any negligence of the defendant, he could not recover in any event, and such charge in the particulars objected to are contradictory to the main charge, especially that part following, to-wit: 'Every servant is led to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open and apparent to him.'

"Fifth. Defendant specially excepts to the following parts of the court's main charge: 'And if in the breaking of the valve yoke you find no casualty of such unknown and unforseeable
77 cause as aforesaid, then, in that event, you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to assume any of the risks ordinarily incident to his work, or even open and apparent to him at the time he was hurt.'

'Defendant objects to this language in the main charge because the quoted parts are not the law covering this case, and said charge objected to would license the plaintiff, solely because he had been on duty over sixteen hours, to wilfully assume any position of danger or even wantonly cause his own injury and such charge would deny the defendant any right of offset or defense of any kind, and would thereby place upon defendant the burden of paying any damage which the jury might find, notwithstanding the plaintiff had wilfully placed himself in a position of danger, well knowing the result that might follow.

"Sixth. Defendant specially excepts to the following part of the court's main charge, to-wit: 'You are instructed that as to his allegation of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence, but in its allegation as to assumed risk and contributory negligence and the existence of a casualty and unknown and unforseeable cause as pleaded by defendant through which plaintiff was required to work over sixteen hours, all burden of proof rests upon the defendant.'

"Defendant specially excepts to this part of the main charge of the court because same places an unjust burden of proof on defendant not required by law and compels the defendant to assume the burden of the proof by its own testimony, notwithstanding the plaintiff's testimony may itself establish either that the plaintiff assumed the risk of or was guilty of contributory negligence, or that a casualty happened, or that the delay was caused from an unknown and unforseeable cause, and requires plaintiff, notwithstanding these conditions may have been established by plaintiff's testimony, to assume the preponderance of proof in regard to same and each of same."

78 And be it further remembered that the defendant requested the Court in writing, before said case had been submitted to the jury the three following special charges:

Special Charge No. 1.

"At the request of the defendant, you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit, the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employees at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

"You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-hour Law, or the Hours of Service Act, first, from a casualty; second, an unavoidable accident, and third, where the delay was the result of a cause now known to the defendant, or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left Pueblo, Colorado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-hour Law or the Hours of Service Act would have no application to this case."

79 *Special Charge No. 2.*

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants and employes, then and in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and should you so find, the provisions of the Sixteen-hour Law or the Hours of Service Act would not apply."

Special Charge No. 3.

"At the request of the defendant you are charged that if you find from the evidence in this cause that when the plaintiff went out upon the pilot of the engine and attempted to go over or along or about the same that he slipped or fell from said pilot to the ground and was thereby run over and injured, and that said act of slipping and falling from said pilot was an accident and that the defendant, its servants, agents and employes, in no wise contributed thereto, that then and in that event plaintiff cannot recover and your verdict should be for the defendant."

And be it further remembered that the Court refused to give said three charges and refused to give either of said charges to the jury, to which the defendant in open court and while the jury was still in Court and had not retired to consider their verdict duly excepted on the grounds as follows: As to Special Charge No. 1, because the matters and things therein suggested to the court are not covered by its main charge, and because the statements therein contained are the law in this case and are required by the evidence introduced to have been submitted to the jury. Said charge was especially demanded because the Court's main charge did not separate the casualty as pleaded by the defendant from the delay which was the result of a cause not known to the defendant or its
80 officer or agent, but coupled said two defenses together in such a way as to lead the jury to believe that they comprised only one defense, when, in fact, under the law casualty and unavoidable delay from causes not known to the defendant are each separate defenses. As to Special Charge No. 2, because said charge presents the law of this case, and was not covered by the Court's main charge, and was demanded by the evidence introduced. Said charge was especially demanded because the Interstate Commerce Commission provided on June 25th, 1908, as pleaded and established by the defendant, that where delay is caused by a condition which could not be foreseen by the defendant at the time the engine left its terminal, then the employee could be kept in service to a relay or division point of said engine. As to Special Charge No. 3, because said charge is the law in this case, was called for by the evidence and was not covered by the Court's main charge and should have been given.

Be it further remembered that the jury then retired and in due time returned into Court with a verdict in favor of the plaintiff for damages in the sum of $12,500.00 on the 28th day of September, 1912.

Be it further remembered that the defendant duly filed its amended motion for a new trial herein, the same being as follows:

"Comes now the Atchison, Topeka and Santa Fe Railway Company, and leave of court first had and obtained, files this, its amended motion for a new trial, and as ground for such motion says:

"That the court, in its main charge to the jury, committed the following errors:

I.

"The court erred in charging the jury as follows:

"Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours and subject to the instructions that you will hereafter be given on this phase of the case.'

"The quoted paragraph is error for the reason that the same assumes, independently of any further language in connection therewith, that the defendant was in some manner negligent under the Sixteen-hour Law or under the Hours of Service Act.

II.

"The court erred in charging the jury as follows:

" 'That if you believe from the preponderance of the evi-
81 dence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sill step where plaintiff was standing, then in any one or more of such events, the plaintiff may recover.

"Said paragraph in the court's main charge is erroneous for the reason that the court tells the jury that plaintiff may recover (*a*) if there was negligence on the part of defendant in placing the disabled engine where same was placed in the train; or (*b*) in the manner of handling the disabled engine by the engineer Artist; or (*c*) if there was negligence in placing the sill step inside of the rails; or (*d*) in making it too narrow; or (*e*) in allowing cinders to be kept on the sill step where plaintiff was standing; that then, because of the existence of any one or more of said conditions, plaintiff could recover, notwithstanding one of the same, or all of same, though negligently placed or permitted, had nothing to do, in fact, with causing the plaintiff to fall from the pilot of said engine.

III.

"The court erred in charging the jury as follows:

" 'If the defendant was negligent in none of these particulars, you will find for the defendant.' '

"Said language in the court's main charge was erroneous because no verdict can be rendered for the defendant unless the jury are able to find that the defendant was not negligent in any of the particulars named, notwithstanding none of said conditions contributed to or brought about plaintiff's accident which caused him to be injured.

IV.

"The court erred in charging the jury as follows:

" 'And further, if the injuries of the plaintiff were the result

of a mere accident without fault or negligence on the part of either the plaintiff or the defendant, the plaintiff cannot recover.'"

"Said language in the court's main charge is erroneous because it makes the defendant liable unless the jury are able to
82 find from the evidence that the plaintiff was not guilty of negligence, when, as a matter of law, if the plaintiff was guilty of negligence in some manner or respect not excusing him and wholly disconnected from any negligence of the defendant he could not recover in any event, and such charge in the particulars referred to is contradictory of the main charge, especially that part following, to-wit:

"'Every servant is led to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open and apparent to him.'

V.

"The court erred in charging the jury as follows:

"'And if in the breaking of the valve yoke you find no casualty of such unknown and unforeseeable cause as aforesaid, then, in that event, you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty, of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to assume any of the risks ordinarily incident to his work, or even open and apparent to him at the time he was hurt.'

"Said language in the court's main charge is erroneous for the reason that the quoted part is not the law covering this case, and said charge would license the plaintiff, solely because he had been on duty over sixteen hours, to wilfully assume any position of danger or even wantonly cause his own injury, and such charge would deny the defendant any right of offset or defense of any kind, and would thereby place upon defendant the burden of paying any damage which the jury might find, notwithstanding the plaintiff had wilfully placed himself in a position of danger, well knowing the result that might follow.

VI.

"The court erred in charging the jury as follows:

"'You are instructed that as to his allegations of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence, but in its allegation as to assumed risk and contributory negligence and the existence of a cas-
83 ualty and unknown and unforeseeable cause as pleaded by defendant through which plaintiff was required to work over sixteen hours, all burden of proof rests upon the defendant.'

"Said paragraph in the Court's main charge is erroneous because same places an unjust burden of proof on defendant not required by law and compels the defendant to assume the burden of the proof by its own testimony, notwithstanding the plaintiff's testimony may

itself establish either that the plaintiff assumed the risk or was guilty of contributory negligence, or that a casualty happened, or that the delay was caused from an unknown and unfor-seeable cause, and requires plaintiff, notwithstanding these conditions may have been established by plaintiff's testimony, to assume the preponderance of proof in regard to same and each of same.

VII.

"The court erred in refusing to give defendant's Special Charge No. 1, which is as follows:

"'At the request of the defendant, you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit, the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employes at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

"'You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-hour Law, or the Hours of Service Act, first, from a casualty; second, an unavoidable accident, and third, where the delay was the result of a cause not known to the defendant, or its officers or agent in charge of such employee at the time said employee left a terminal,
and which could not have been foreseen, or upon the exist-
84 ence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left Pueblo, Colorado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-hour Law or the Hours of Service Act would have *not* application to this case.'

"For the reason that said special charge presented the law in this case and same was demanded by the evidence introduced and the matters charged upon therein were not sufficiently covered by the court's main charge.

"Said charge was especially demanded because the court's main charge did not separate the casualty as pleaded by the defendant from the delay which was the result of a cause not known to the defendant, or its officer or agent, but coupled said two defenses together in such a way as to lead the jury to believe that they com-

prised only one defense, when, in fact, under the law, casualty and unavoidable delay from causes not known to the defendant are each separate defenses.

VIII.

"The court erred in refusing to give defendant's Special Charge No. 2, which is as follows:

" 'At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants and employes, then and in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end
85 of the run of said engine, and that should you so find, the provisions of the Sixteen-hour Law or the Hours of Service Act would not apply.'

"Because said charge presented the law of this case and was not covered by the court's main charge and was demanded by the evidence introduced. Said charge was especially demanded because the Interstate Commerce Commission provided on June 25, 1908, as pleaded and established by the defendant, that where a delay is caused by a condition which could not be foreseen by the defendant at the time the engine left its terminal, then the employee could be kept in service to a relay or division point of said engine.

IX.

"The court erred in refusing to give defendant's Special Charge No. 3, which is as follows:

" 'At the request of the defendant you are charged that if you find from the evidence in this cause that when the plaintiff went out upon the pilot of the engine and attempted to go over or along or about the same that he slipped or fell from said pilot to the ground and was thereby run over and injured, and that said act of slipping and falling from said pilot was an accident and that the defendant, its servants, agents and employes, in no wise contributed thereto that then and in that event plaintiff cannot recover and your verdict should be for the defendant.'

"Because said charge is the law of this case, was called for by the evidence and was not covered by the court's main charge and should have been given.

X.

"The verdict of the jury rendered in this cause is against the evidence and not supported by the evidence in this, that the statement made by the plaintiff and read in evidence by the plaintiff and dated January 7, 1911, plainly shows that the injury to plaintiff was occa-

sioned wholly by an accident and not while the plaintiff was in the discharge of any duty required of him; that the plaintiff, at the time he was injured and fell from the point of the pilot, was not engaged in oiling the cylinders of the engine but had passed beyond the cylinders from the place where he had been riding, to-wit, on the cab; that the evidence in this cause shows that the plaintiff could have reached the cylinders of the engine over a perfectly safe route
86 by stepping from the cab to the ground and then walking along the engine, almost at a standstill, to the cylinders and there oiled the same; but, on the other hand, that plaintiff did not follow the safe course but climbed over the engine along the running board, down on the pilot and to the very front extremity thereof where there was no cylinder to be oiled, and where, without any duty to be performed, he was standing when, as he states, from some unknown cause which he cannot explain, he fell from the pilot and was run over.

XI.

"The verdict of the jury in this case is excessive when measured by the evidence introduced and is for much more than the earning power of plaintiff, as established, would justify and the court should require a remittitur to a sum which is warranted by the testimony.

"Wherefore, and for the errors complained of, defendant moves the court to grant it a new trial; and, in any event, the defendant moves the court to reduce the verdict of the jury to such an amount as to the court may seem just and right."

Which said motion was, by the Court on the 5th day of October, overruled and to which the defendant then and there in open court duly excepted and gave notice of appeal, and now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exception in this case and prays that the same may be settled and allowed and signed and certified by the Judge as provided.

TURNEY & BURGES,
TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Defendant, Atchison, Topeka and Santa Fe Railway Company.

Allowed and signed this the 2d day of November, A. D. 1912.
T. S. MAXEY, *Judge.*

El Paso, Oct. 28th, 1912.

87 I hereby O. K. this bill of exceptions, except the part on p. 61, beginning with words "on the grounds as follows" to the end of paragraph and for the reason that same is purely argumentation and no part of the bill, as to proceedings had.

ENGLEKING & JOHNSON,
Attorneys for Plaintiff.

Indorsed: No. 352, Law. Claude Swearingen vs. Atchison, Topeka and Santa Fe Railway Company. Defendant's Bill of Exceptions. Filed November 2, 1912. D. H. Hart, Clerk.

Petition of Defendant for Writ of Error.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Your petitioner, the Atchison, Topeka and Santa Fe Railway Company, a corporation, respectfully represents that at a term of the District Court of the United States for the Western District of Texas, El Paso Division, in a suit depending in said court between the said Claude Swearingen as Plaintiff and the said Atchison, Topeka and Santa Fe Railway Company as defendant, No. 352 Law on the docket of said court, plaintiff recovered against your petitioners a judgment in the sum of twelve thousand, five hundred dollars, ($12,500.00), besides costs of suit; that in the proceedings for the recovery of same and in the rendition of said judgment there was and is error to the great prejudice and damage of your petitioner.

Petitioner represent- that plaintiff and his attorneys of record, S. Engleking and C. P. Johnson, composing the firm of Engleking and Johnson, reside in the city and county of El Paso and state of Texas.

Petitioner further represents that it has filed in this court its bills of exception and assignments of error and here presents the same for the inspection of the court and prays that after inspection thereof, it be granted a writ of error to remove said judgment and pro-
88 ceedings had in said cause to the United States Circuit Court of Appeals for the Fifth Circuit, whose sessions are fixed to be held in the city of New Orleans, in the state of Louisiana, for revision, correction and reversal, and in duty bound will ever pray.

TURNEY & BURGES,
Attorneys for Petitioner.

Granted: November 19th, A. D. 1912.

T. S. MAXEY, *Judge.*

Indorsed: No. 352, Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Petition of Defendant for Writ of Error. Filed November 16th, 1912. D. H. Hart, Clerk. By Geo. B. Oliver, Deputy. Engelking & Johnson.

Assignment of Error.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Assignments of Error.

Now comes the defendant, Atchison, Topeka and Santa Fe Railway Company, and says that, in the record and proceedings in the above styled cause, there is manifest error which it assigns as such as follows:

I.

The court erred in charging the jury as follows:

"Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours and subject to the instructions that you will hereafter be given on this phase of the case."

The quoted paragraph is error for the reason that the same assumes, independently of any further language in connection
89 therewith, that the defendant was in some manner negligent under the Sixteen-hour Law or under the Hours of Service Act.

II.

The court erred in charging the jury as follows:

"That if you believe from the preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sill step where plaintiff was standing, then in any one or more of such events, the plaintiff may recover."

Said paragraph in the court's main charge is erroneous for the reason that the court tells the jury that plaintiff may recover (*a*) if there was negligence on the part of defendant in placing the disabled engine where same was placed in the train; or (*b*) in the manner of handling the disabled engine by the engineer Artist; or (*c*) if there was negligence in placing the sill step inside of the rail, or (*d*) in making it too narrow; or (*e*) in allowing cinders to be kept on the sill step where plaintiff was standing; that then, because of the existence of any one or more of said conditions, plaintiff could recover, notwithstanding one of the same, or all of same, though negligently

placed or permitted, had nothing to do, in fact, with causing the plaintiff to fall from the pilot of said engine.

III.

The court erred in charging the jury as follows:

"If the defendant was negligent in none of these particulars, you will find for the defendant."

Said language in the court's main charge was erroneous because no verdict can be rendered for the defendant unless the jury are able to find that the defendant was not negligent in any of the particulars named, notwithstanding none of said conditions contributed to or brought about plaintiff's accident which caused him to be injured.

IV.

The court erred in charging the jury as follows:

"And further, if the injuries of the plaintiff were the result
90 of a mere accident without fault or negligence on the part of either the plaintiff or the defendant, the plaintiff cannot recover."

Said language in the court's main charge is erroneous because it makes the defendant liable unless the jury are able to find from the evidence that the plaintiff was not guilty of negligence, when, as a matter of law, if the plaintiff was guilty of negligence in some manner or respect not excusing him and wholly disconnected from any negligence of the defendant he could not recover in any event, and such charge in the particulars referred to is contradictory of the main charge, especially that part following, to-wit:

"Every servant is led to assume as a part of the contract of his employment the dangers ordinarily incident to his employment or open and apparent to him."

V.

The court erred in charging the jury as follows:

"And if in the breaking of the valve yoke you find no casualty of such unknown and unforseeable cause as aforesaid, then, in that event, you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to assume any of the risks ordinarily incident to his work, or even open and apparent to him at the time he was hurt."

Said language in the court's main charge is erroneous for the reason that the quoted part is not the law covering this case, and said charge would license the plaintiff, solely because he had been on duty over sixteen hours, to wilfully assume any position of danger or even wantonly cause his own injury, and such charge would deny the defendant any right of offset or defense of any kind, and would thereby place upon defendant the burden of paying any damage which the jury might find, notwithstanding the plaintiff had wilfully placed himself in a position of danger, well knowing the result that might follow.

VI.

The court erred in charging the jury as follows:

"You are instructed that as to his allegation of negligence the burden of proof is upon the plaintiff to establish the same by a
91 preponderance of the evidence, but in its allegation as to assumed risk and contributory negligence and the existence of a casualty and unknown and unforseeable cause as pleaded by defendant through which plaintiff was required to work over sixteen hours, all burden of proof rests upon the defendant."

Said paragraph in the court's main charge is erroneous because same places an unjust burden of proof on defendant not required by law and compels the defendant to assume the burden of the proof by its own testimony, notwithstanding the plaintiff's testimony may itself establish either that the plaintiff assumed the risk or was guilty of contributory negligence, or that a casualty happened, or that the delay was caused from an unknown and unfor-seeable cause, and requires plaintiff, notwithstanding these conditions may have been established by plaintiff's testimony, to assume the preponderance of proof in regard to same and each of same.

VII.

The court erred in refusing to give defendant's Special Charge No. 1, which is as follows:

"At the request of the defendant, you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit, the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employes at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

"You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-hour Law, or the Hours of Service Act, first, from a casualty; second, an unavoidable accident, and third, where the delay was the result of a cause not known to the defendant, or its officers or agent in charge of such employee at the time said employee left a
92 terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine

left Pueblo, Colorado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-hour Law or the Hours of Service Act would have no application to this case."

For the reason that said special charge presented the law in this case and same was demanded by the evidence introduced and the matter- charged upon therein were not sufficiently covered by the court's main charge.

Said charge was especially demanded because the court's main charge did not separate the casualty as pleaded by the defendant from the delay which was the result of a cause not known to the defendant, or its officer or agent, but coupled said two defenses together in such a way as to lead the jury to believe that they comprised only one defense, when, in fact, under the law, casualty and unavoidable delay from causes not known to the defendant are each separate defenses.

VIII.

The court erred in refusing to give defendant's Special Charge No. 2, which is as follows:

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants or employees, then and in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and that should you so find, the provisions
93 of the Sixteen-hour Law or the Hours of Service Act would not apply."

Because said charge presented the law of this case and was not covered by the court's main charge and was demanded by the evidence introduced. Said charge was especially demanded because the Interstate Commerce Commission provided on June 25, 1908, as pleaded and established by the defendant, that where a delay is caused by a condition which could not be foreseen by the defendant at the time the engine left its terminal, then the employee could be kept in service to a relay or division point of said engine.

IX.

The court erred in refusing to give defendant's Special Charge No. 3, which is as follows:

"At the request of the defendant you are charged that if you find from the evidence in this cause that when the plaintiff went out upon the pilot of the engine and attempted to go over or along or about the same that he slipped or fell from said pilot to the ground and was thereby run over and injured, and that said act of slipping and

falling from said pilot was an accident and that the defendant, its servants, agents and employes in no wise contributed thereto, that then and in that event plaintiff cannot recover and your verdict should be for the defendant."

Because said charge is the law of this case, was called for by the evidence and was not covered by the court's main charge and should have been given.

X.

The verdict of the jury rendered in this cause is against the evidence and not supported by the evidence in this, that the statement made by the plaintiff and read in evidence by the plaintiff and dated January 7, 1911, plainly shows that the injury to plaintiff was occasioned wholly by an accident and not while the plaintiff was in the discharge of any duty required of him; that the plaintiff, at the time he was injured and fell from the point of the pilot, was not engaged in oiling the cylinders of the engine but had passed beyond the cylinders from the place where he had been riding, to-wit, on the cab; that the evidence in this cause shows that the plaintiff could have reached the cylinders of the engine over a perfectly safe route by stepping from the cab to the ground and then walking along the engine, almost at a standstill, to the cylinders and there oiled
94 the same; but, on the other hand, that plaintiff did not follow the safe course but climbed over the engine along the running board, down on to tthe pilot and to the very front extremity thereof where there was no cylinder to be oiled, and where, without any duty to be performed, he was standing, when, as he states, from some unknown cause which he cannot explain, he fell from the pilot and was run over.

XI.

The verdict of the jury in this case is excessive when measured by the evidence introduced and is for much more than the earning power of plaintiff, as established, would justify and the court should require a remittitur to a sum which is warranted by the testimony.

Wherefore, the defendant, Atchison, Topeka and Santa Fe Railway Company, prays that the judgment rendered against it in the District Court of the United States for the Western District of Texas be reversed and remanded for a new trial.

TURNEY & BURGES.
Attorneys for Defendant.

Indorsed No. 352. Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Assignments of Error. Filed November 16th, 1912. D. H. Hart, Clerk. By Geo. B. Oliver, Deputy.

Order Allowing Writ of Error and Fixing Bond.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff.
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Upon motion of attorneys for defendant, Atchison, Topeka and Santa Fe Railway Company, it is

Ordered that the writ of error prayed for by it in its peti-
95 tion be, and the same is, hereby allowed in accordance with the prayer in its petition, and the amount of the writ of error bond on said writ of error is hereby fixed at the sum of twenty-six thousand dollars ($26,000.00), and upon giving the same, the judgment of this court shall be suspended pending the determination of said writ of error.

The clerk will duly enter this order of record at the El Paso Division of the Court.

Ordered at Austin, Texas, this the 19th day of November, A. D. 1912.

T. S. MAXEY, *Judge.*

Supersedeas Bond.

In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 352. Law.

CLAUDE SWEARINGEN, Plaintiff.
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Know all men by these presents: That we, Atchison, Topeka and Santa Fe Railway Company as principal, and Joshua S. Raynold- and W. L. Tooley, as sureties, are held and firmly bound unto Claude Swearingen, plaintiff above named, in the sum of twenty-six thousand dollars ($26,000.00), to be paid to the said Claude Swearingen, his executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 12th day of November, A. D. 1912.

Whereas, lately, at a term of the District Court of the United State- for the Western District of Texas, El Paso Division, in a suit depend-

ing in said court between the said Claude Swearingen as plaintiff and the Atchison, Topeka and Santa Fe Railway Company as defendant, numbered 352 Law on the docket of said court, a judgment was rendered against said Atchison, Topeka and Santa Fe Railway Company on the — day of September, 1912, and the said Atchison,
96 Topeka and Santa Fe Railway Company having obtained a writ of error from said court to reverse the judgment in the aforesaid suit, and a citation directed to said Claude Swearingen is about to be issued, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Fifth Circuit, to be holden at —.

Now, the condition of the above obligation is such, that if the said Atchison, Topeka and Santa Fe Railway Company shall prosecute its writ of error to effect and shall answer all damages and costs may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Principal*,
By W. W. TURNEY,
Its Attorney.
JOSHUA S. RAYNOLDS.
W. L. TOOLEY.

THE UNITED STATES OF AMERICA,
Western District of Texas:

I, D. H. Hart, Clerk of the District Court of the United States for the Western District of Texas, do hereby certify that Joshua S. Raynolds and W. L. Tooley, whose names are subscribed as sureties to the foregoing Writ of Error Bond are known to me, and are, in my opinion, good and sufficient sureties upon said bond for the sum of $26,000.00, and that if the said bond were presented to me for approval I would approve same.

In testimony whereof, I have hereunto set my hand and the Seal of said Court, at office in the City of El Paso, Texas, this 16th day of November A. D. 1912.

[SEAL.] D. H. HART, *Clerk*,
By GEORGE D. OLIVER, *Deputy*.

Approved: November 19th, A. D. 1912.
T. S. MAXEY, *Judge*.

Indorsed: No. 352 Law. In the District Court of the United States for the Western District of Texas, El Paso Division. Claude
97 Swearingen, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Supersedeas Bond. Filed November 19, 1912. D. H. Hart, Clerk.

[SEAL.] D. H. HART, *Clerk*.

Writ of Error.

UNITED STATES OF AMERICA,
The President of the United States, ss:

To the Honorable the Judge of the District Court of the United States for the Western District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court, before you, or some of you, between Claude Swearingen, Plaintiff, and the Atchison, Topeka & Santa Fe Railway Company, defendant a manifest error hath happened, to the great damage of the said the Atchison, Topeka & Santa Fe Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19th day of November in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] D. H. HART,
Clerk of the United States District Court
for the Western District of Texas.

Allowed this, the 19th day of November A. D. 1912.

T. S. MAXEY,
United States Judge.

98 Indorsed: No. 352 Law. Claude Swearingen, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, Defendant. Writ of Error. Issued: November 19, 1912. D. H. Hart, Clerk. Filed Nov. 21, 1912. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

Citation in Error.

THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Claude Swearingen and Engelking and Johnson, a firm composed of S. Engelking and C. J. Johnson, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Fifth Circuit at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the District Court of the United States for the Western District of Texas in the cause wherein Claude Swearingen, is plaintiff and the Atchison, Topeka & Santa Fe Railway Company is defendant to show cause, if any there be, why the judgment rendered against the said Atchison, Topeka & Santa Fe Railway Company as in said Writ of Error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, and the seal of said District Court, this 19th day of November in the year of our Lord one thousand nine hundred and twelve.

Signed this, the 19th day of November 1912.

[SEAL.] T. S. MAXEY,
United States Judge.

Attest:
D. H. HART, *Clerk.*

Indorsed: No. 352 Law. Original. Claude Swearingen vs. Atchison, Topeka & Santa Fe Railway Company. Citation. Received Nov. 23, 1912. Marshal's Docket No. 873. Marshal's Return. Came to hand, this 23rd day of November 1912, and executed
99 the 23rd day of November, 1912, by serving Claude Swearingen with a copy hereof, said service being had by delivering to S. Engelking, Attorney of Record for Claude Swearingen, in person at El Paso, Texas, a true copy of this writ. Eugene Nolte, U. S. Marshal, Western District of Texas. By J. H. Rogers, Deputy. Fees serving citation, $2.00. Filed November 30th, 1912. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

Certificate to Transcript.

THE UNITED STATES OF AMERICA,
Western District of Texas:

I, D. H. Hart, Clerk of the District Court of the United States for the Western District of Texas, do hereby certify that the foregoing 99 pages contain a true and correct Transcript of the Record in cause

No. 352 on the Law Docket of said Court, entitled Claude Swearingen, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, Defendant, as the same appears from the files and records of said cause in my office at El Paso, Texas, and

I further certify that the original Writ of Error and Citation in Error in said cause are embraced in said record, being numbered pages 97 and 98, copies thereof being left on file among the papers in said cause in my said office.

In testimony whereof, witness my official signature and the Seal of said Court, at office in the City of El Paso, Texas, this the 14th day of December A. D. 1912.

[SEAL.]

D. H. HART, *Clerk*,
By —— ——, *Deputy*.

100 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 5th, 1913.

No. 2453.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
versus
CLAUDE SWEARINGEN.

On this day this cause was called, and was submitted to the Court on the record and briefs on file, per the stipulation of counsel for both parties.

Opinion of the Court.

Filed December 1st, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2453.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
v.
CLAUDE SWEARINGEN.

101 Error to the United States District Court for the Western District of Texas.

Before Pardee and Shelby, Circuit Judges, and Call, District Judge.

By the COURT:

We find no reversible error assigned in this case or patent on the face of the record.

The judgment of the District Court is
Affirmed.

Judgment.

Extract from the Minutes of December 1st, 1913.

No. 2453.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
versus
CLAUDE SWEARINGEN.

This cause came on to be heard on the transcript of the
102 record from the District Court of the United States for the Western District of Texas, and was submitted to the Court on the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby affirmed;

It is further ordered and adjudged that the plaintiff in error, Atchison, Topeka & Santa Fe Railway Company, and the sureties on the writ of error bond herein, Joshua S. Raynolds, and W. L. Tooley, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

103 *Petition for Rehearing.*

Filed December 17th, 1913.

No. 2453.

In the United States Circuit Court of Appeals for the Fifth Circuit.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
CLAUDE SWEARINGEN, Defendant in Error.

Petition for Rehearing.

Having been advised that this Honorable Court had entered judgment, whereby judgment entered in the District Court of the United States for the Western District of Texas, El Paso Division, was affirmed, and having again studied the record, we think that, with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiff in error for these reasons:

First. It is thought that the charge of the Court submitting the right of defendant in error to recover because of the alleged
104 violation of what is known as the Sixteen Hour Law was too restricted and that thereunder, as the question was submitted

to the jury, no latitude was in fact allowed, and that a finding against your petitioner was necessary and demanded by the charge given. The charge complained of was as follows:

"Now as to the Sixteen Hour Law: By Sec. 2 of the Act of Congress of March 4, 1907, entitled 'An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' it is provided:

" 'That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved, and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.'

"And Sec. 3 of this Act makes it an offense to violate Sec. 2, but contains a proviso as follows:

" 'Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.'

"The plaintiff was required to be on duty from 7:40 P. M. on December 19th to the time of his injury at 1:25 P. M. on December 20th, 1910, a period of more than sixteen hours. The evidence is undisputed on this point. It is immaterial whether, after the valve yoke broke, the plaintiff was a fireman or a messenger, whether he was on the road or on a sidetrack; he was continuously on duty. The only question is: Was he required to work over sixteen hours on account of a casualty or a cause not known to and unforeseeable by the defendant or its servants at the time he left Pueblo?

105 You are instructed that a casualty proceeds from an unknown cause, or is an unusual effect of a known cause. It may properly be said to occur by chance and unexpectedly (see 139 U. S. 86). No act or result that could have been guarded against or prevented by ordinary care and foresight can be denominated a casualty or an unknown and unforeseeable cause, as these terms are used in this Act of Congress. If you find then from a consideration of all the evidence that the breaking of the valve yoke as pleaded by defendant was a casualty or unknown and unforeseeable cause, as provided by said Act of Congress, then you cannot find negligence in the fact that plaintiff was required to work more than sixteen hours, but you may look to other facts in evidence, if any, to determine whether defendant was guilty of negligence causing or contributing to plaintiff's injury. If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke

could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt." (Printed Rec., pp. 13-15.)

The jury is told in this charge: (*a*) That the employee had been on duty for more than 16 hours; (*b*) That if the breaking of the valve yoke was no such casualty or unknown or unforeseeable cause as is provided by law, that negligence may be inferred on the part of the defendant at the time of plaintiff's injury in requiring him to be on duty more than 16 hours; (*c*) That if same was not the result of a casualty of such unknown or unforeseeable cause that the defenses of contributory negligence and assumed risk
106 should be disregarded. It will, we believe, be apparent that another essential was necessary before recovery was warranted, which is, whether or not the negligence presented by this charge was the occasion of the injury, or whether the same so directly contributed thereto as to be designated the proximate cause. Our contention is that the jury might have found against the defendant on each of the questions submitted in the above charge and yet no verdict against it would have been warranted unless it was further found to have been the occasion of the accident, and we are not warranted in presuming what would have been the jury's finding had that been embodied in the charge. We quote from plaintiff's testimony as to how he got hurt:

"We next stopped at Castle Rocks; and were going into the side track and were very nearly stopped in order to let the brakeman make the switch; and after he got the switch they drifted down in the switch and after they got in they had to let him shut up the switch, and then they drifted down maybe a train length. But going in on that side track the cylinders began to groan and I went out and was going to oil those cylinders. I went out on the left running board, which was the only place to go; and I got out on the pilot; but before I got out there we came to a pile of ashes that was high enough to get up on that step. Just then the train made a sudden jerk, jerking my foot some way off the step and I tried to get another foothold on that step but could not on account of the ashes, and the train stopped again, knocking my foot off the head of the pilot on to the ground, and I threw myself some way or other, getting my foot caught and the pony truck wheel went over it, and cut it off." (Printed Rec., p. 37.)

"I slipped off that pilot because of the ashes on it." (Printed Rec. 45.)

"I cannot tell definitely how long I had been standing on the steps in that dangerous position when the accident happened, but it had not been very long." (Printed Rec. 46.)

We believe the above constitutes the direct evidence on the issue as to the accident itself.

We respectfully suggest that the charge of the Court made
107 of the defendant an insurer, and that thereunder proof to the effect that the employee had worked over time, and had been hurt is all that was necessary to fix liability, which view was condemned by the Supreme Court of the United States in the case of St. L. I. M. & S. Ry. vs. McWhirter, 33rd Supreme Court Reporter, 858.

We believe that the evidence justifies the conclusion that in truth the accident was not occasioned by reason of the fact that this man had been with that engine more than sixteen hours, but if perchance there shall be a difference of opinion as to the effect of this evidence, you are reminded that the Court's charge did not require a finding to that effect before recovery was warranted, and it is particularly with reference to the pronouncement of the Court as to the law that we complain.

There is nothing in the Hours of Service Statute which makes a carrier responsible for injuries received by an employee who has been on duty a greater length of time than permitted under the statute, and certainly before such a recovery should be authorized there must be a finding that the violation of this statute was the proximate cause, and in this case no such requirement was submitted in the Court's charge.

Again, it is to be remarked that under the provisions of the Sixteen Hour Law employees may be required to remain on duty without regard thereto in case of casualty, unavoidable accident, act of God, or where the delay is occasioned from a cause not known to the carrier or its officers or agent in charge of such employee at the time of leaving the terminal, and which could not have been foreseen. It will be presumed that Congress used the words above referred to advisedly, and that it was intended to give effect to each clause of the proviso. Furthermore, that there is no repetition in the proviso, for which reason we contend that casualty and cause not known to the carrier at the time the employee left the terminal are not interchangeable expressions, but that effect must be given to each, and that either of them will exempt the carrier. It is to be noted that these terms are used interchangeably in the Court's charge, and that thereunder the jury is in effect directed that they
mean one and the same thing. It may be that there is
108 nothing in the evidence to indicate that this delay was the result of an unavoidable accident, but we seriously contend that the record shows that the accident was the result of a cause not known to the carrier or agent in charge of the employee at the time he left the terminal, and which could not have been foreseen.

The engineer testified that there was nothing the matter with the valve yoke when he started out. (Printed Rec. 57.)

"I think I could have oiled this engine in a couple of minutes,

no matter from what cause it became dry. It had been some forty (40) or fifty (50) minutes before this yoke broke that we had had trouble with the water foaming, or trouble of that kind, and the engine had been working all right from the time we had trouble with engine foaming up to the time the valve yoke broke. When the valve yoke broke we had had no warning of any kind that it was going to break. If there had been anything present to bring about this bad condition, I would have known it, and as an engineer, considering the fact that we had had no foaming water for forty (40) or fifty (50) minutes before the break-down, I can not tell what broke that valve yoke. The first thing I knew about the breaking of the valve yoke was when it broke." (Printed Record, p. 58), and likewise as follows:

"The only trouble I know of about my engine was the water foaming. It had just a couple of minutes to — rid of the foaming water. I would blow the engine off and it would settle right down. Foaming water is a frequent thing on all railroads that run out of Pueblo and wherever they had bad water. There was nothing about that that indicated there was something wrong with the valve yoke. If there was anything about the valve yoke that was wrong, the engine would have gone a little lame, and I would have known it at once." (Printed Record, p. 63.)

It appears from the testimony without contradiction that when the engine begins to foam it can be blown off and will settle down, and we contend that there is no evidence in this record that there was any trouble with this engine prior to the accident except that the engine foamed, which was frequently the case with engines on that division. We further contend that there is no evidence in the record that when an engine foams it is an indication that the valve yoke is in trouble.

109 The witness G. Hails, who was the only one offered by the plaintiff on this question, said:

"There is a sediment that makes the water foam; and it is the properties in the water that makes it foam. When the water begins to foam and you blow the engine off that gets rid of a part of the foaming. You can get along with that water by frequently blowing the engine off. You turn on your blow-off cock and get rid of that water, and that has a tendency to stop it from foaming. The oil from the lubricator goes into the valves at the rate of three drops a minute. If you blow the water off and stop the foaming and stop the water from going into the valves and let your oil in everything will be all right. If you went 40 or 50 minutes without the water foaming and the lubricator was running, oil working, no trouble with the engine, I would say that the engine was all right, of course. An engine is all right as long as the valves are lubricated. I think I know what a valve yoke is. It is a good thing until it breaks. No one can tell it is going to break in advance; but you can tell when a valve gets dry, and one can figure it is going to break when it does. All the harm the water does is temporary, as long as it runs through and does not interfere with the lubrication; and when you stop the water and let in the oil it is in good condition. It is possible to

break one valve yoke and not know it at that time, and then break the other. You break the other. I have broken part of the valve and not the other valve, and then the engine became, as we say, lame, the valves were not square. Up to the time it became lame we kept on running. If you have a temporary infusion of water, and you get rid of that by opening the blow-off cock or some other means, you will settle the water and get rid of that flooding of the cylinders. A great many roads have to treat their water. I find that most every road in the West has to treat their water; and they have to put this compound or dope in the water at intervals along the route. I have done it between here and Sanderson, and between here and Valentine whenever my water begun to foam; and it is done to tone down the water and keep it from foaming. They have nearly always used that compound on the Southern Pacific." (Printed Rec., 66-67.)

110 It was for the purpose of presenting defendant's case fully on this issue and in line with the proviso contained in the Sixteen Hour Law, that Special Charge No. 2 was requested, which we quote:

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine, did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants and employees, then in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and that should you so find, the provisions of the Sixteen Hour Law or the Hours of Service Act would not apply." (Printed Rec., 21-22.)

It is contended that there was evidence to sustain this charge, and that the defendant was entitled to the defense therein presented, and that same was not contained in the Court's charge.

Second. As to the other issues presented to the jury and for easy reference we quote from the charge:

"You are instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. (See 95 U. S. 441-2.) Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours, and subject to the instructions that will hereafter be given on this phase of the case, you are charged that if you believe from a preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same

by the engineer, Artist, at this time, or if you believe that
111 there was negligence in placing the sill step inside of the rails, or making it too narrow; or that there was negligence in allowing cinders (if any) to be caught on the sill step where plaintiff was standing, then in any one or more of such events the plaintiff may recover." (Printed Rec., 12.)

Five distinct and several questions are therein propounded:

(*a*) Giving the disabled engine the position which it occupied at the time of the accident;

(*b*) The manner of handling the same by the engineer at that time;

(*c*) Placing the sill step inside of the rails;

(*d*) Making the sill step too narrow;

(*e*) Allowing cinders to be caught on the sill step where plaintiff was standing.

We have quoted above what is believed to be the essential portions of the evidence as to how this accident happened. It seems quite true that all five of the acts just above recited could not have happened, at least to such an extent as that it may fairly be said that they contributed to the injuries, and as to some of them it would appear that the plaintiff assumed the risk encountered thereby. He testified as to the position of the disabled engine in the train. This position was known to him before he undertook to act as messenger, and as to the position of the sill step, he testified that he knew all about the same, saw it, before he climbed over the running board and undertook to lubricate the valve (Printed Record 43). It of course cannot be known on what issue the verdict was returned, and for that reason we feel that we may complain as to each issue and especially those that have no evidence to sustain them, and particularly because of the fact that thereunder a finding was warranted on any or all of the acts charged, whether they contributed to the injury or not.

Third. The Court charged the jury as follows:

"And further, if the injuries of the plaintiff were the result of a mere accident without fault or negligence on the part of the defendant, then the plaintiff cannot recover."

This was complained of in our fourth assignment of error (Printed Rec., 89), and it is respectfully submitted not only that the Court's definition therein as to what is a mere accident is
112 an erroneous statement, but also that thereunder it was necessary for the jury to find that the plaintiff was without fault before the defendant could be excused. If the injuries were the result of an accident, the question of fault or negligence on the part of the defendant was not involved. If the defendant was guilty of negligence, then the question of accident was not involved, so that from either viewpoint this charge as a definition of accident was meaningless, and in truth imposed a degree of care upon the defendant, which is inconsistent with the fact of accident.

Wherefore, upon the foregoing grounds, plaintiff in error prays this Honorable Court to grant to it a rehearing of said cause.

(Signed) A. H. CULWELL,
(Signed) J. W. TERRY,
Attorneys for Plaintiff in Error and Petitioner.

I, J. W. Terry, of counsel for the plaintiff in error herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well-founded, and that the same is not interposed for delay.

(Signed) J. W. TERRY.

113 *Order Denying Rehearing.*

Extract from the Minutes of December 23d, 1913.

No. 2453.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
versus
CLAUDE SWEARINGEN.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Petition for Writ of Error and Order Allowing Same.

Filed February 6th, 1914.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2453.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
CLAUDE SWEARINGEN, Defendant in Error.

Petition for Allowance of Writ of Error.

114 To the Honorable the Supreme Court of the United States:

Comes The Atchison, Topeka and Santa Fe Railway Company, by its Attorneys, Gardiner Lathrop, A. B. Browne, J. W. Terry and A. H. Culwell, and complains that in the record and proceedings and also in the rendition of the judgment in a suit between The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, and Claude Swearingen, defendant in error in the United States Circuit Court of Appeals for the Fifth Circuit, and in which a final judgment was rendered against the said Plaintiff in Error on the 1st day of December, 1913, and in which Plaintiff in Error's motion for a rehearing was overruled by the said Court on the 23d day of December, 1913, wherein the certain judgment entered in the United States District Court for the Western District of Texas, El Paso Division, in the case of Claude Swearingen vs. The Atchison,

Topeka and Santa Fe Railway Company against your peti-
115 tioner in the sum of $12,500.00 September 28th, 1912, was affirmed, the same being a suit for personal injuries alleged to have been sustained by the plaintiff while in the service of the defendant as a locomotive fireman engaged in the operation of a train handling Interstate commerce, and said action being maintained in part under the provisions of the act of Congress of April 22nd, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," and the negligence asserted among others by the Complainant being the violation by the defendant of the act of Congress of March 4th, 1907, entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," and commonly referred to as the Hours of Service Act, and whereby this is a suit arising under the laws of the United States, and the jurisdiction whereof is not dependent en-
116 tirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states, and the amount in controversy herein being more than $1,000.00 besides costs and whereof jurisdiction is conferred upon this Honorable Court by reason of Section 241 and Section 128 of "The Judicial Code," and in which cause on the trial thereof the court, by reason of the issues submitted to the jury and in the manner of such submission, authorized a recovery in favor of said plaintiff and against your petitioner under the provisions of the said act of Congress of March 4th, 1907, and herein referred to as the Hours of Service Act and directed a finding against your petitioner for the injuries sustained by plaintiff on account of the negligence of your petitioner, growing out of, among other things, its alleged violation of said Hours of Service Act, excusing the same only in the event it should be found that the delay made basis of such violation was a casualty or unknown and unforeseeable
117 cause wherein and whereby the jury was directed that your petitioner was guilty of negligence as a matter of law for which recovery would be warranted unless the delay was a casualty or unknown and unforeseeable cause and without regard to whether or not the alleged violation of said Hours of Service Act was the proximate cause of the injuries complained of or even contributed thereto, and by which said charge as well as by the refusal of said court to give to the jury special instruction requested by your petitioner there was denied to it the benefit of that provision of said Hours of Service Act wherein the carrier is excused for a delay which is the result of a cause not known to it or its officer or agent in charge of said employee at the time said employee left a terminal, and which could not have been foreseen, and by reason of the charge as given to the jury recovery was warranted whether any of
118 the issues as submitted contributed to the injuries or not, and said charge as submitted and the judgment rendered thereon, as well as the affirmance thereof by the Honorable Circuit Court of Appeals for the Fifth Circuit, has placed a liability upon your petitioner not warranted under the Hours of Service Act, all of which

appears from the record and proceedings in the said suit; manifest error hath happened to the great damage of The Atchison, Topeka and Santa Fe Railway Coompany;

Wherefore, the said The Atchison, Topeka and Santa Fe Railway Company, by its Attorneys, prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

(Signed) GARDINER LATHROP,
A. B. BROWNE,
J. W. TERRY,
A. H. CULWELL,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error.

119 Allowed by—
(Signed) J. R. LAMAR,
Associate Justice of the Supreme Court of the United States.

Assignments of Error.

Filed February 6th, 1914.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2453.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
CLAUDE SWEARINGEN, Defendant in Error.

In Error from the United States Circuit Court of Appeals for the Fifth Circuit.

To the Supreme Court of the United States:

Comes now The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, by its Attorneys, Gardiner Lathrop, A. B. Browne, J. W. Terry and A. H. Culwell, and says that in the
120 record and proceedings aforesaid there is manifest error in the judgment and decision of the United States Circuit Court of Appeals for the Fifth Circuit, to-wit:

First. The Circuit Court of Appeals erred in holding that the Railway Company was liable herein under the provisions of the act of Congress of March 4th, 1907, entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon", commonly referred to as the Hours of Service Act, and in holding in effect that the violation of said act was negligence per se, for which recovery for personal injuries could be had whether the violation of said act contributed to the injuries sustained or not.

Second. The Circuit Court of Appeals erred in holding in effect that the delay by reason of which the plaintiff was on duty for a longer period than sixteen hours was not excused as provided in said Hours of Service Act under the facts of this case, and in
121 holding in effect that defendant was not warranted under the facts of this case in requiring the plaintiff to remain with the engine after the expiration of sixteen hours' continuous service.

Third. The Circuit Court of Appeals erred in holding that the trial court committed no error in failing and refusing to give to the jury plaintiff in error's Special Charge No. 1, which was as follows:

"At the request of the defendant, you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employes at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

"You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-Hour Law, or the Hours of Service Act, first, from a
122 casualty; second, an unavoidable accident, and third, where the delay was the result of a cause not known to the defendant, or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left Pueblo, Colorado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-hour Law or the Hours of Service Act would have no application to this case."

Fourth. The Circuit Court of Appeals erred in holding that the trial court committed no error in failing and refusing to give to the jury plaintiff in error's Special Charge No. 2, which was as follows:

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the
123 engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said

valve yoke and which condition could not have been foreseen by the defendant, its agents, servants or employes, then and in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and that should you so find, the provisions of the Sixteen-hour Law or the Hours of Service Act would not apply."

Fifth. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court committed no error in charging the jury as follows:

"Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours and subject to the instructions that you will hereafter be given on this phase of the case",

which paragraph was erroneous for the reason that it assumes independently of any further language in connection therewith that the plaintiff in error was in some manner negligent under the Hours of Service Act.

Sixth. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court committed no error in charging
124 the jury as follows:

"That if you believe from the preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer Artist at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sill step where plaintiff was standing, then in any one or more of such events, the plaintiff may recover."

Said paragraph in the court's main charge is erroneous for the reason that the court tells the jury that plaintiff may recover (*a*) if there was negligence on the part of defendant in placing the disabled engine where same was placed in the train; or (*b*) in the manner of handling the disabled engine by the engineer Artist; or (*c*) if there was negligence in placing the sill step inside of the rail, or (*d*) in making it too narrow; or (*e*) in allowing cinders to be kept on the sill step where plaintiff was standing; that then, because of the existence of any one or more of said conditions, plain-
125 tiff could recover, notwithstanding one of the same, or all of same, though negligently placed or permitted, had nothing to do, in fact, with causing the plaintiff to fall from the pilot of said engine.

Respectfully submitted,

(Signed) GARDINER LATHROP,
A. B. BROWNE,
J. W. TERRY,
A. H. CULWELL,

Attorneys for Plaintiff in Error, The Atchison, Topeka and Santa Fe Railway Company.

Bond on Writ of Error.

Filed February 6th, 1914.

United States Circuit Court of Appeals, Fifth Circuit.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
CLAUDE SWEARINGEN, Defendant in Error.

In Error from the United States Circuit Court of Appeals for the Fifth Circuit.

Supersedeas Bond.

126 Know all men by these presents that we, The Atchison, Topeka and Santa Fe Railway Company, as principal, and John Sealy and Sealy Hutchings, as sureties, are held and firmly bound unto Claude Swearingen in the full and just sum of Thirty Thousand Dollars ($30,000) to be paid to the said Claude Swearingen, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 16th day of January, A. D. 1914.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit in a suit pending in said court between The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, and Claude Swearingen, Defendant in Error, a judgment was rendered against The Atchison, Topeka and Santa Fe Railway Company and in favor of the said Claude Swearingen in
127 cause numbered — on the docket of said United States Circuit Court of Appeals for the Fifth Circuit, by which judgment the judgment of the United States District Court for the Western District of Texas, El Paso Division, was affirmed, and the said The Atchison, Topeka and Santa Fe Railway Company having obtained a writ of error, filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and citation directed to the said Claude Swearingen, citing and admonishing said Claude Swearingen to be and appear at a Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof; now the condition of the above obligation is such that if The Atchison, Topeka and Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

128 Sealed and delivered in the presence of—
(Signed) THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By TERRY, CAVIN & MILLS, *Its Solicitors.*
(Signed) JNO. SEALY.
[SEAL.]
(Signed) SEALY HUTCHINGS.

Attest:
(Signed) C. C. DEMING,
Assistant Secretary The Atchison, Topeka and Santa Fe Railway Company.

Writ to operate as a supersedeas.
Approved by
(Signed) J. R. LAMAR,
Associate Justice Supreme Court of the United States.

I, John Sealy, do swear that I am worth in my own right at least the sum of Thirty Thousand Dollars ($30,000.00) after deducting from my property all that which is exempted by the Constitution and Laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or
129 security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Thirty Thousand Dollars ($30,000.00).
(Signed) JNO. SEALY.

Sworn to and subscribed before me this 16th day of January, A. D. 1914.
[SEAL.] (Signed) JNO. E. GREGG,
Notary Public in and for Galveston County, Texas.

I, Sealy Hutchings, do swear that I am worth in my own right at least the sum of Thirty Thousand Dollars ($30,000.00) after deducting from my property all that which is exempted by the Constitution and Laws of the State from forced sale, and after payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to
130 execution worth more than Thirty Thousand Dollars ($30,000.00).
[SEAL.] (Signed) SEALY HUTCHINGS.

Sworn to and subscribed before me this 16th day of January, A. D. 1914.
(Signed) JNO. G. GREGG,
Notary Public in and for Galveston County, Texas.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 100 to 130 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2453, wherein the Atchison, Topeka and
131 Santa Fe Railway Company is Plaintiff in Error, and Claude Swearingen is Defendant in Error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 99 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 11th day of February, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

132 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, and Claude Swearingen, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, The Atchison, Topeka & Santa Fe Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceed-

ings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of January, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
J. R. LAMAR,
Associate Justice of the Supreme Court of the United States.

133 I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the Defendant in Error.

Dated this 6th day of February A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the U. S. Circuit Court of Appeals for the Fifth Circuit.

134 UNITED STATES OF AMERICA, *ss:*

To Claude Swearengen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit wherein The Atchison, Topeka & Santa Fe Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph R. Lamar, Associate Justice of the Supreme Court of the United States, this 26th day of January, in the year of our Lord one thousand nine hundred and fourteen.

J. R. LAMAR,
Associate Justice of the Supreme Court of the United States.

135 On this thirtieth day of January, in the year of our Lord one thousand nine hundred and fourteen, personally appeared J. H. Grover before me the subscriber, C. J. Thomson, a

Notary Public in and for Bexar County, Texas, and makes oath that he delivered a true copy of the within citation to S. Engelking, Attorney of Record for Claude Swearingen, Defendant in Error.

J. H. GROVER.

Sworn to and subscribed the 30th day of January, A. D. 1914.

[Seal Notary Public, County of Bexar, Texas.]

C. J. THOMSON,
Notary Public, Bexar County, Texas.

[Endorsed:] No. 2453. In the United States Circuit Court of Appeals, Fifth Circuit. Atchison, Topeka & Santa Fe Railway Company, Plaintiff in Error, vs. Claude Swearingen, Defendant in Error. Citation. U. S. Circuit Court of Appeals. Filed Feb. 6, 1914. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 24,065. U. S. Circuit Court Appeals, 5th Circuit. Term No. 370. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, vs. Claude Swearingen. Filed February 19th, 1914. File No. 24,065.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 74

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

CLAUDE SWEARINGEN,
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. TERRY,
A. H. CULWELL,
ROBERT DUNLAP,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 74

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Plaintiff in Error,

vs.

CLAUDE SWEARINGEN,

Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was filed in the United States District Court at El Paso for damages growing out of personal injuries sustained by defendant in error while employed as a fireman on a train engaged in the handling of interstate commerce. It is alleged in his petition that the engine of which he was the fireman broke down en route and that it was picked up by another train, that he was directed to go with said engine, which had become part of another train, to its destination, with instructions from his engineer that whenever the train began to slow down, preparatory to stopping, for him to get out on the pilot with an oil can in order to oil the cylinders through the release

plugs or through the indicator plug holes as soon as the train came to a stop; that he should oil both cylinders and valves each time the train stopped in order to avoid damaging them; that as they pulled into Castle Rock, Colorado, he got out on the pilot sill step of the engine to perform the service demanded of him, and was caused to fall therefrom and lost a leg; that this injury was the result of the negligence of the railway company in this: (*first*), that the train was handled in a negligent and rough manner at the time of the fall; (*second*), that the pilot sill step was too low, and there were cinders between the rails which caught on the pilot sill step, and for which no safe place to do the work was provided; (*third*), that the engine on which he was riding had been placed near the back end of the train, instead of near the front, which made it subject to greater jar and jerk; and, (*fourth*), that he was permitted and required to remain on duty for more than sixteen (16) hours, and that he was not relieved at the end of sixteen (16) hours as required by law. (Pt. Rec., 3-4.)

The answer of the railway company, in addition to pleading the general issue, charged that the accident was the result of the contributory negligence of the plaintiff in attempting to oil the engine at the time and manner that he did, and that he furthermore assumed the risk of the dangers to be encountered at that time and place, and under those circumstances; that the delay to the train of which he was the fireman, and which made it necessary to annul the same, and send him as a messenger therewith in another train, was occasioned by casualty which was the sudden breaking of the valve opening on the inside of the steam chest, which was occasioned by causes not known to the defendant, and which could not have been foreseen by it by the use of reasonable diligence, and that but for said casualty which occasioned

the delay, plaintiff would not have been sixteen hours upon said train and engine, and that the defendant could not be held liable for the happenings complained of, in that it had the right to require the plaintiff, notwithstanding the Sixteen Hour Law, to stay with said engine until he reached a terminal where it could be repaired, and that under the rulings of the Interstate Commerce Commission, which rulings the Commission had the right to make, and which were in full force at the time of this accident, it was the duty of the defendant to send this plaintiff as a messenger with said engine until it reached its destination. (Pt. Rec., 6-8.)

A verdict and judgment was entered against plaintiff in error in the sum of twelve thousand five hundred dollars ($12,500.00). (Pt. Rec., 20.) Amended motion for a new trial which had been duly filed by the defendant (Pt. Rec., 21-25) was by the court overruled October 5, 1912. (Pt. Rec., 26.) Bill of exception was duly preserved in manner and form as required by law (Pt. Rec., 28-69) and writ of error was duly prosecuted from the judgment so rendered to the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the judgment, the only opinion rendered being, "We find no reversible error assigned in this case or patent on the face of the record." (Pt. Rec., 80-81.)

A petition for rehearing was filed in the Circuit Court of Appeals, and was overruled. (Pt. Rec., 81-88.)

The writ of error to this court has been duly prosecuted. (Pt. Rec., 88, 90, 93, 95.)

The main evidence on behalf of plaintiff was his own testimony. In substance he stated he was fireman on train running between Pueblo and Denver numbered 631. He started on this trip at 7:40 on the night of December 19th and got only as far as Palmer Lake, at which place

a valve yoke on the right side of the engine and within the steam chest was broken. It was 119 miles from Pueblo to Denver and they had gone but 63 miles when the accident occurred. He had then been on duty about fifteen hours. The usual time taken between Pueblo and Denver is seven or eight hours. The engine came to a dead stop when the valve yoke broke between Monument and Palmer Lake. The engineer disconnected the broken side of the engine, after which he had only one valve to work with and the train was backed into Monument. This engine was then put into train No. 87 and pulled to Palmer Lake, at which place the sixteen hours was up, and the engineer left the engine after receiving permission from the trainmaster so to do. He left this engine in charge of plaintiff and went to Denver on a passenger train. "The engineer said, 'Whenever you see they are going to stop you go out there and be ready to oil them indicator plug holes, as you don't know how long they are going to stop, so be ready.' You cannot grease the release valves of an engine while it is standing still; but they have to be greased while the engine is drifting not working steam. I was ready to go down on the pilot to be ready to oil the indicator plug holes when they were going to stop. There is a little bit of a thing provided to stand on on the pilot, about 14 inches long and about 3½ inches wide. It is made of wood and is attached to the bottom of the pilot or cow-catcher. This step was about four or five inches from the rails." (Pt. Rec., 30, 31.)

The train next stopped at Castle Rocks and as they were going on to the sidetrack and drifted down the switch nearly a train length the cylinders on this engine began to groan. He went out for the purpose of oiling the cylinders. "I went out on the left running board, which was the only place to go; and I got out on the pilot; but before I got out there we came to a pile of

ashes that was high enough to get upon that step. Just then the train made a sudden jerk, jerking my foot some way off the step and I tried to get another foothold on that step but could not on account of the ashes, and the train stopped again, knocking my foot off the head of the pilot on to the ground, and I threw myself some way or other, getting my foot caught and the pony truck wheel went over it and cut it off." The ashes were coal cinders. The accident happened about 1:25 on the afternoon of December 20th. "The difference between putting an engine in the back end of a train and in the front end is this: The engine being so much heavier than an ordinary car, that when the slack runs out it gives a jerk; and when the slack runs in it runs in like a shot; and when it is placed next to the other engine that absorbs the shock." (Pt. Rec., 31.)

He did not have any foothold on the step on account of the ashes and cinders and he was so tired, sleepy and hungry he was not in condition to stay on easily. This sill step was inside the rails and because of which if he were jerked off he would go down in front of the pilot. If the sill step had been outside of the rails he would have fallen in the clear. He had seen other sill steps outside of the pilot beam, but he did not know of any rule concerning the position in which said sill steps should be placed. (Pt. Rec., 32.)

He was required to be on duty at that time under the engineer's orders. (Pt. Rec., 33.)

He identified a written statement concerning the accident made and signed by him on January 7, 1911. (Pt. Rec., 34.)

He did not know what the rule of the company was as to the proper loading of the disabled engine. Mr. Meister had been his engineer. "The engineer told me to at-

tempt to oil this engine while it was in motion. He told me when I saw they were going to stop to oil it. I know enough myself to know that I could not oil the release valves while it was not in motion. The engineer told me to be out there and be ready to oil it. He told me to go out there on the pilot while it was running and be ready to oil the indicator plug holes when it stopped. I could not have stayed in the cab and waited and complied with the engineer's orders. I could not have stepped from the cab on to the ground and walked along the side of the engine when it stopped and complied with my order. The engineer did not say for me not to get on the ground but to climb to the running board and into a dangerous place on the pilot and hang out there; but he said to be ready, and it is the practical way to go out on the running board." He had oiled the release valves after leaving Palmer Lake while the train was running. He climbed around in the same way, but did not get down on the step. "I saw the step and saw it was only 3½ or 4 or 5 inches from the rail. I knew all about the pilot and the little step of wood I spoke of; and when this engine moved into the sidetrack at the rate of two or three miles an hour I climbed over the running board instead of on the ground to get to the front of the engine." He had been relieved of all responsibility of train orders. When he was working around this narrow step he had his back to the front of the engine kind of "catercornered." (Pt. Rec., 35.)

The pilot was somewhat under the coupling of the car in front of it. There is always a little handhold on the end of the boiler; "and down on a level with the boiler is a little platform and center pin comes up through there." He was within a step of the platform. "The engineer said to be out there, out on the pilot. He told me to be out there and 'out there' means on the pilot,

and could not have meant out on the ground or at any place but this little step. I could have stayed on the running board instead of the step, but that was not my orders. The engineer says, 'As soon as you see the train is going to stop be out there, because you do not know how long they are to stop.' He did not say out on the pilot, but he said 'out there.'" He did not look for cinders. He was told to pilot the engine in and was what is called a "messenger." He had been relieved of all orders and duties. Did not fire the engine or anything of that kind. The engine was dead and there was nothing broken about the pilot on the engine. (Pt. Rec., 36.)

Referring to his written statement, he testified: "I said there were no defects in the pilot itself. I said, 'There were no defects in the pilot that I know of that would cause me to fall,' but I had reference to the pilot itself; there was nothing broken about the pilot. Every thing attached to the pilot is the pilot. The step is a part of the pilot. The statement that 'there were no defects on the pilot that I know of that would cause me to fall,' is right. In the statement 'there was a little dirt on the foot board or step on the engine' I had reference to the cinders. I did not tell the claim agent any more than I had to; but everything I told him was true, and my endeavor was to tell him the truth at that time, whether for or against me, to keep nothing back. There was no controversy between me and the company at the time the statement was made. * * * The reason I did not tell about the cinders on the track in that statement was because I considered it my business to tell only what I wanted to. I made the remark that there was dirt on that step. The dirt was not on the step when I went out there, but after I stepped on the step we came to this pile of ashes in the track. I never said a word about the ashes to the claim agent. I said there

was dirt on the step at that time, and now I say it was ashes and cinders. I did not step on the ashes when I went to the pilot because it was not there when I stepped down, but the ashes came there after I had stepped on the step. When I made the statement, 'As far as I know the step was in good condition,' I had reference to the step itself. It would not have been in good condition if it was covered with dirt; but the claim agent asked me about the step and I did not say anything about the dirt. * * * I had been standing on the steps, in that dangerous position, when the accident happened but it had not been very long." (Pt. Rec., 36, 37.)

He had oiled the disabled engine at one place while it was running through the release valves; but the second time he was going to oil it after it stopped through the indicator plug holes. The train which picked them up had 12 or 15 cars. Mr. Artist was engineer of that train. In approaching the siding they had to stop in order to let the rear brakeman throw the switch. The train went on about 10 or 12 car lengths and then came to a full stop and there is where he got hurt. Did not know before reaching Castle Rock that they were going to take the siding. He had dozed off on the engine a little bit but did not go sound asleep. The Santa Fe has machine shops at Denver to repair engines and if his engine belonged in Denver that was the natural place for it. He agreed to act as messenger. The valve yoke is in the cylinder or steam chest. The valves were dry because the engine foamed and washed all the oil off the valves. He made a trip on this engine the day before and it foamed on that trip. He was not an engineer and had no experience with valve yokes. (Pt. Rec., 39-42.)

Counsel for plaintiff then offered in evidence plaintiff's written statement (Pt. Rec., 40) made in January

following the accident, in which, among other things, he stated:

"The engineer, Mr. Meister, got off at Palmer Lake and said he was going to deadhead in on 607 and left me in charge of the engine after being on duty 17 hours and 15 minutes, with the instructions to oil the engine when I got a chance. We were pulling in the sidetrack at Castle Rock and the train was very near stopped and I went out over the left running board and down onto the pilot and slipped in some way and got my left foot in under the pilot and I could not pull my foot out before the pony truck caught and one wheel run over it. * * * I was on the little step on pilot when I fell. The foot step, as far as I know, this step was in good condition. There was no snow or ice on the pilot of engine at the time. The wheel of engine that ran over my foot just made half a turn after it ran over my foot. They applied the air just before I slipped off and there might have been a little jar when the slack run in. * * * I do not blame the trainmen who were handling the train at the time. I blame the railway company for asking me to do the work of an engineer after being on duty 17 hours and 15 minutes, when I am not qualified as an engineer. * * * There were no defects in pilot that I know of that would cause me to fall, there was a little dirt on the footboard or step on engine. The engineer had taken out a couple of plugs in the cylinders and he told me when I got a chance to put oil in there and I was going out for that purpose when I was hurt. The engineer did not tell me that the oil would be put in while the engine was moving, but I went out expecting them to stop as they were very near stopped when I left the cab of the engine." (Pt. Rec., 56 and 57.)

(He was not performing the engineer's duty, but merely acting as messenger. It further appears from

his own testimony that his exaggerated interpretation of the engineer's direction, given for the first time on the witness stand, is not only unsupported by but contrary to the language of the engineer which was used. It is also directly contrary to his written statement as above shown.)

George Meister, the engineer, among other things testified:

The valve yoke broke early in the morning about seven and a half hours after they left the Pueblo terminal. (Pt. Rec., 45.) He got back to Monument about eight hours and twenty minutes after leaving Pueblo. He disconnected the valves on both sides in order that the engine could be towed into Denver. It was a dead engine and could not be moved by steam. The fireman stayed on the engine to lubricate the valves and the cylinders. He made a statement to plaintiff at Palmer Lake as to what he should do. "I told him when the engine got to groaning and when they stopped to oil the cylinders through the indicator plug holes. I did not tell him to go out on the pilot to be ready to jump to oil it immediately upon stopping. I did not say anything with reference to being ready, 'out there' to oil it. I said, 'Be ready to oil it.' I never said to be ready 'to be out there.' I said when the engine got to groaning, and when they came to a stop to oil the cylinders through the indicator plug holes. I did not direct him to stand anywhere. I did not anticipate he would stand on the step in front of the pilot." (Pt. Rec., 46.)

Referring to the water used in the engine, which is of an alkaline nature, he testified:

"That water requires treatment. It is the business of the fireman while enroute on freight trains to attend to the treatment of the water. (Pt. Rec., 46.) * * * We proceeded to Pinion and there took water. We had

a little trouble with the engine when starting out from Pueblo. There was nothing the matter with the valve yoke when we started out. * * * After taking water at Pinion the engine foamed a little bit until I blew it off. The usual way of blowing off an engine is by opening up the blow-off cock. That settles the water in the boiler. At Fountain we took water again, but I cannot recall whether the engine foamed there or not. If it had foamed again I would have opened up the blow-off cock. * * * It had been some 40 or 50 minutes before this yoke broke that we had had trouble with the water foaming or trouble of that kind; and the engine had been working all right from the time we had trouble with engine foaming up to the time the valve yoke broke. When the valve yoke broke we had had no warning of any kind that it was going to break. If there had been anything present to bring about this bad condition I would have known it; and as an engineer, considering the fact that we had had no foaming water for 40 or 50 minutes before the break-down, I cannot tell what broke that valve yoke. The first thing I knew about the breaking of the valve yoke was when it broke. I knew then that the break was in the valve gearing some place and I then proceeded to find out which side it was on. There was no way to see inside where the yoke was and I disconnected the wrong side, etc. (Pt. Rec., 47.) * * * The water that needs treatment contains foreign matter and alkali. All engines entering Pueblo use the same water. I think all roads entering Pueblo use this same water. * * * The treatment of the water was done with a compound. * * * It is mixed up with boiler water in a bucket with the squirt hose and poured into the tank and of course, it is mixed thoroughly through the water by the movement of the engine. * * * The engineer directs the fireman in his duties; but the treating of

water has been carried on so long that a fireman who has been on that road several days knows when to treat the water. (Pt. Rec., 48.) * * * If an engine foams you will have wet steam, which means that the water raises with the steam and washes the oil off the valve yoke; and just as fast as you throw oil on the valve yoke the boiler water will run in and wash it off; and that will make the yoke hot; but I do not know that it will cause the yoke to break. The yoke works between two surfaces and if you have nothing there but water the yoke will expand with friction; and when it expands it will stick and break. (Pt. Rec., 48, 49.) * * * I cannot say what caused the valve yoke to break. There certainly must have been grease on the valve yoke because the lubricator was working. * * * It took just a couple of minutes to get rid of the foaming water. I would blow the engine off and it would settle right down. Foaming water is a frequent thing on all railroads that run out of Pueblo and wherever they have bad water. There was nothing about that that indicated there was something wrong with the valve yoke. If there was anything about the valve yoke that was wrong the engine would have gone a little lame, and I would have known it at once. It had been some 40 or 50 minutes before the breakdown since I had had trouble with foaming water; and at the time of the breakdown I should think the engine was about half cut off. Previous to that time she was working all right. (Pt. Rec., 51.) * * * That valve yoke, so far as I knew, was in good condition. * * * I increased the supply of valve oil to lubricate the valves quicker in order to keep them from burning and to cut down the friction. * * * The lubricator was full of oil when we started out. * * * My engine was not needing oil when the valve yoke broke." (Pt. Rec., 52.)

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding that the railway company was liable herein under the provisions of the Act of Congress of March 4th, 1907, entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," commonly referred to as the Hours of Service Act, and in holding in effect that the violation of said act was negligence *per se*, for which recovery for personal injuries could be had, whether the violation of said act contributed to the injuries sustained or not.

2. The Circuit Court of Appeals erred in holding in effect that the delay by reason of which the plaintiff was on duty for a longer period than sixteen hours was not excused as provided in said Hours of Service Act under the facts of this case, and in holding in effect that defendant was not warranted under the facts of this case in requiring the plaintiff to remain with the engine after the expiration of sixteen hours' continuous service.

3. The Circuit Court of Appeals erred in holding that the trial court committed no error in failing and refusing to give to the jury plaintiff in error's Special Charge No. 1, which was as follows:

> "At the request of the defendant you are charged that the defendant, among other defenses, has pleaded that if the engine upon which plaintiff was making the trip from Pueblo to Denver, at the time he alleges he was injured, was delayed and that plaintiff was kept in service more than sixteen hours, then such delay was the result of a casualty, to-wit, the sudden breaking of a valve yoke inside of the steam chest, and from causes not known to defendant, or any of its servants or employees at the time said engine left the terminal or beginning point of said journey, and which cause of said breakdown or

casualty to said engine could not have been foreseen by said defendant, its agents or servants in charge of plaintiff, if any were in charge of him, when said engine left the terminal or begun the journey in question.

You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-Hour Law, or the Hours of Service Act, first, from a casualty; second, an unavoidable accident, and, third, where the delay was the result of a cause not known to the defendant, or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood, or should you find that the same arose from an unavoidable accident, or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left Pueblo, Colorado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events, you are charged that the Sixteen-Hour Law or the Hours of Service Act would have no application to this case."

4. The Circuit Court of Appeals erred in holding that the trial court committed no error in failing and refusing to give to the jury plaintiff in error's special charge No. 2, which was as follows:

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agent, servants or employees, then and

in that event, the defendant or the engineer in charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and that should you so find, the provisions of the Sixteen-Hour Law or the Hours of Service Act would not apply."

5. The Circuit Court of Appeals erred in holding that the trial court committed no error in charging the jury as follows:

> "Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours and subject to the instructions that you will hereafter be given on this phase of the case,"

which paragraph was erroneous for the reason that it assumes independently of any further language in connection therewith that the plaintiff in error was in some manner negligent under the Hours of Service Act.

6. The Circuit Court of Appeals erred in holding that the trial court committed no error in charging the jury as follows:

> "That if you believe from the preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of handling the same by the engineer, Artist, at this time; or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders, if any, to be kept on the sill step where plaintiff was standing, then in any one or more of such events, the plaintiff may recover."

Said paragraph in the court's main charge is erroneous for the reason that the court tells the jury that plaintiff may recover (a) if there was negligence on the part of defendant in placing the disabled engine where same was placed in the train; or (b) in the manner of handling the disabled engine by the engineer, Artist; or (c) if

there was negligence in placing the sill step inside of the rail, or (d) in making it too narrow; or (e) in allowing cinders to be kept on the sill step where plaintiff was standing; that then, because of the existence of any one or more of said conditions, plaintiff could recover, notwithstanding one of the same, or all of the same, though negligently placed or permitted, had nothing to do, in fact, with causing the plaintiff to fall from the pilot of said engine.

7. The Circuit Court of Appeals erred in holding that the trial court committed no error in charging the jury as follows:

> "You are instructed that as to his allegations of negligence the burden of proof is upon the plaintiff to establish the same by a preponderance of the evidence, but in its allegation as to assumed risk and contributory negligence and the existence of a casualty and unknown and unforeseeable cause as pleaded by defendant through which plaintiff was required to work over sixteen hours, the burden of proof rests upon the defendant."

This placed an unjust burden of proof on defendant in view of plaintiff's testimony which tended to show that he had assumed the risk and was guilty of contributory negligence, and, also, that the delay was caused by something which could not have been reasonably foreseen. (Pt. Rec., 73.)

BRIEF OF ARGUMENT.

I.

THE COURT ERRED IN CHARGING IN EFFECT THAT A VIOLATION OF THE HOURS OF SERVICE ACT WAS NEGLIGENCE PER SE AND DESTROYED THE DEFENSES OF ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE REGARDLESS OF WHETHER OR NOT IT WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

The court charged (Tr., 59, 60):

"The plaintiff was required to be on duty from 7:40 P. M. on December 19th to the time of his injury at 1:25 P. M. on December 20th, 1910, a period of more than sixteen hours. The evidence is undisputed on this point. It is immaterial whether after the valve yoke broke, the plaintiff was a fireman or a messenger, whether he was on the road or on a sidetrack, he was continuously on duty. The only question is: Was he required to work over sixteen hours on account of a casualty or a cause not known to and unforeseeable by the defendant or its servants at the time he left Pueblo? You are instructed that a casualty proceeds from an unknown cause, or is an unusual effect of a known cause. It may properly be said to occur by chance and unexpectedly (See 139 U. S., 86). No act or result that could have been guarded against or prevented by ordinary care and foresight can be denominated a casualty or an unknown and unforeseeable cause, as these terms are used in this Act of Congress. If you find then from a consideration of all the evidence that the breaking of the valve yoke as pleaded by defendant was a casualty or unknown and unforeseeable cause, as provided by said Act of Congress, then you cannot find negligence in the fact that plaintiff was required to work more than sixteen hours, but you may look to other facts in evidence, if any, to determine whether defendant was guilty of negligence causing or contributing to plaintiff's injury. If, however,

you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. *And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, and then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt.*"

It is to be noted that the jury is there told that negligence could be inferred if the plaintiff was kept on duty for more than sixteen hours and that if in the breaking of the valve yoke they found no casualty or such unknown or unforeseeable cause, then they should disregard defendant's pleas of contributory negligence and assumed risk and plaintiff could not be held guilty of contributory negligence or as having assumed the risks incident to his work or even open and apparent to him.

Such instructions are directly contrary to the ruling of this court in *St. Louis, etc. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 280, 281.

There suit was brought for the death of a flagman who was killed after he had been on duty more than sixteen consecutive hours. The Court of Appeals of Kentucky affirmed a judgment in favor of the plaintiff, upholding a charge of the trial court that a violation of the Sixteen-Hour Law was negligence *per se*. In ruling that

this construction of the law was erroneous, this court said:

> "In giving to the statute the construction above stated we think error was committed. The Hours of Service Act was approved March 4, 1907, and is entitled 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.' Chapter 2939, 34 Stat., 1415. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employe to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

In the Nitro-Glycerine Case, 15 Wall., on page 537, it was tersely stated:

> "A party charging negligence as a ground of action must prove it. He must show that the defendant by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of."

But such fact is not to be solved by indulging in surmise or conjecture, or resorting to imaginary possibilities.

> *St. Louis & I. M. Ry. Co.* v. *McWhirter, supra,* p. 282.

It is never presumed, but must be proved.

> *Puget Sound T. L. & P. Co.* v. *Hunt,* 223 Fed., 952, 955, 956.
>
> 29 Cyc., 600.

In *Missouri, K. & T. Ry. Co.* v. *Foreman et al.,* 174 Fed., 377, the court said on page 381:

> "It was incumbent upon plaintiffs, before such recovery could be had, to both allege and prove, not only the cause which operated to produce the death, but also, that such cause had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable."

See also:

> *Midland Valley R. Co.* v. *Fulgham,* 181 Fed., 91, 95.
>
> *Felt* v. *Boston & M. R. Co.,* 161 Mass., 311; 37 N. E., 375.
>
> *Hannigan* v. *Lehigh, etc., R. Co.,* 157 N. Y., 244; 51 N. E., 992.

That the trial court meant to charge the jury that a violation of the Hours of Service Act constituted negligence as a matter of law appears not only from the ex-

press instruction on that point, but also inferentially from the following sentence of the instruction:

> "Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours, and subject to the instructions that will hereafter be given on this phase of the case, you are charged," etc. (Pt. Rec., 58.)

Thereafter the court specifically instructed the jury, as quoted heretofore, that if they found that the breaking of the valve yoke was no casualty or such unknown and unforeseeable cause as aforesaid, then they should disregard the plea of contributory negligence or assumption of risk, etc.

But the language of this court in the McWhirter case—"It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage"—was used in respect to a case involving as here the Hours of Service Act. Here the court specifically charged the jury that a mere violation of the act, etc., destroyed the pleas of assumed risk and contributory negligence without reference to the fact that such violation of the act may not have been a proximate cause of the plaintiff's injury. In other words, the jury were instructed that they could not consider plaintiff's negligence, however gross same may have been, and could not consider that he had assumed the risks, however plain, open and apparent to him they may have been, and that he could not assume the risks ordinarily incident to the work.

The defendant had no reason to believe or anticipate that although the plaintiff might be required to remain in a perfunctory position upon the engine after the expiration of sixteen hours that he would undertake or attempt to oil the engine while the train was in motion

and just as it was approaching a station, or assume a dangerous position in doing so. The accident was not such as could have been reasonably anticipated as likely to follow from keeping the plaintiff upon the engine longer than sixteen hours. What constitutes proximate cause, we will discuss more fully under another heading.

II.

ASIDE FROM THE QUESTION PRESENTED BY THE SECOND SPECIFICATION OF ERROR, AS TO WHETHER THE HOURS OF SERVICE ACT SHOULD HAVE BEEN SUBMITTED TO THE JURY AS FOUNDATION FOR RECOVERY, IT IS INSISTED THAT THE SPECIAL CHARGE REQUESTED BY PLAINTIFF IN ERROR UPON THIS SUBJECT AND MADE THE BASES OF THE THIRD AND FOURTH SPECIFICATIONS OF ERROR SHOULD HAVE BEEN GIVEN TO THE JURY, FOR THE REASON THAT THE CHARGE OF THE COURT DID NOT COMPREHEND ALL OF THE RELIEVING CLAUSES CONTAINED IN THE PROVISO OF THE ACT AND ON WHICH EVIDENCE WAS OFFERED.

As heretofore stated, the court charged:

> "If you find then from a consideration of all the evidence that the breaking of the valve yoke as pleaded by defendant was a casualty or unknown and unforeseeable cause, as provided by said Act of Congress, then you cannot find negligence in the fact that plaintiff was required to work more than sixteen hours, but you may look to other facts in evidence, if any, to determine whether defendant was guilty of negligence causing or contributing to plaintiff's injury. * * * And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, and then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving,

nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt." (Pt. Rec., 59, 60.)

Defendant requested the court to charge the jury as follows:

"You are further charged that, under the law, the defendant would be relieved from the provisions of what is known as the Sixteen-hour Law, or the Hours of Service Act, first, from a casualty; second, an unavoidable accident, and third, where the delay was the result of a cause not known to the defendant, or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen, or upon the existence of any one or more of said matters numbered first, second and third. Therefore, if you find, under the facts and circumstances in this case, that the delay to the engine and train arose from a casualty as that term is understood; or should you find that the same arose from an unavoidable accident; or should you find that the delay was the result of a cause not known to the defendant or its officer or agent in charge of plaintiff at the time the engine left Pueblo, Colorado, on the night of December 19, 1910, and that same could not have been foreseen, that then, in either of said events you are charged that the Sixteen-hour Law or the Hours of Service Act would have no application to this case." (Pt. Rec., 63.)

And further:

"At the request of the defendant you are charged that if you find from the evidence in this cause that, at the time the valve yoke of the engine upon which plaintiff was riding broke, sixteen hours had not elapsed since he was called to go upon said journey, and that when said engine left Pueblo, the defendant or the engineer in charge of said engine did not know of any condition then existing which would cause the breakdown of said valve yoke and which condition could not have been foreseen by the defendant, its agents, servants, and employes, then and in that event, the defendant or the engineer in

> charge of said engine could continue plaintiff on duty upon said engine to Denver, Colorado, which was the end of the run of said engine, and should you so find, the provisions of the Sixteen-hour Law or the Hours of Service Act would not apply." (Pt. Rec., 63.)

Under the proviso of the Act it does not apply (a) in any case of casualty, (b) unavoidable accident, (c) or the act of God, (d) or where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time such employe left the terminal and which could not have been foreseen.

The charge only submitted "casualty or unknown and unforeseeable cause," while the special charge which was refused also submitted the question of unavoidable accident.

The instruction actually given by the trial court was too narrow since it gave the jury to understand the burden was on petitioner to show not only that there was a casualty, but also that the delay was due to a cause not known to it at the time the employe left the terminal.

Indeed, under the undisputed evidence in the case it appeared that the delay in reaching the terminal by reason of the breakdown of the engine due to the breaking of a concealed valve yoke in the steam chest, was such a one as could not reasonably have been foreseen and was unknown at the time the engine started on its trip. It is, therefore, clear to say the least that an instruction in some such general language as suggested by plaintiff in error was necessary and is well shown by the following excerpts from the testimony of the engineer:

> "I think I could have oiled this engine in a couple of minutes no matter from what cause it became dry. It had been some 40 or 50 minutes before this yoke broke that we had had trouble with the water foaming or trouble of that kind; and the engine had

been working all right from the time we had trouble with the engine foaming up to the time the valve yoke broke. When the valve yoke broke we had had no warning of any kind that it was going to break. If there had been anything present to bring about this bad condition I would have known it; and as an engineer, considering the fact that we had had no foaming water for 40 or 50 minutes before the breakdown, I cannot tell what broke that valve yoke. The first thing I knew about the breaking of the valve yoke was when it broke." (Pt. Rec., 47.)

"The only trouble I know of about my engine was the water foaming. It took just a couple of minutes to get rid of the foaming water. I would blow the engine off and it would settle right down. Foaming water is a frequent thing on all railroads that run out of Pueblo and wherever they have bad water. There was nothing about that that indicated there was something wrong with the valve yoke. If there was anything about the valve yoke that was wrong the engine would have gone a little lame, and I would have known it at once." (Pt. Rec., 51.)

So that aside from the question of casualty which is dwelt upon and defined in the court's charge, the other exceptions in the statute are distinctly presented and, we believe, fully established by the evidence. It is a common rule that in the federal courts it takes something more than a mere scintilla of evidence to raise an issue to be submitted to the jury.

Southern Pacific Co. v. *Pool*, 160 U. S., 438, 440.
Slocum v. *New York Life Ins. Co.*, 228 U. S., 364, 369.

Now, there could be nothing more than a mere scintilla, if there is that much, of evidence on behalf of respondent disputing the claim of plaintiff in error to exemption under the above proviso of the statute. It must be remebered that the court directed the jury that if in the breaking of the valve yoke there was no casualty or such unknown and unforeseeable cause then the de-

fenses of assumed risk and contributory negligence were to be disregarded. This charge is most earnestly objected to, not only because it left out of account all reference to the other exceptions in the statute save casualty, but for the additional reason, previously referred to, that it in effect was a charge that a violation of the Sixteen-hour Law by petitioner was *prima facie* negligence and thereunder respondent was relieved of the necessity of showing any direct connection between such violation and the injuries received by respondent.

As illustrative of our contention that the court's submission of the proviso of the Act was not sufficiently comprehensive we quote from the recent case of *United States* v. *New York, O. & W. Ry. Co.*, 216 Fed., 702, 704, 705:

> "If Brookins, on his way to take his trick, had been run over by an automobile and killed or seriously injured, without fault on his part, so as to disable him, there would have occurred, not only an accident (unavoidable so far as he and the defendant railroad were concerned), but a casualty. In my judgment in such a case the provisions of the Act would not apply. 'Casual' according to the Century Dictionary means: 'Happening or coming to pass without apparent cause, without design on the part of the agent, in an unaccountable manner, or as a mere coincidence or accident; coming by chance; accidental; fortuitous; indeterminate; as a casual encounter.' And 'a casual' is one who is admitted into a hospital or a workhouse at irregular and uncertain periods, or because of some accident. 'Casualty' is defined by the same authority as: 'Chance, or what happens by chance; accident, contingency. (2) An unfortunate chance or accident, especially one resulting in bodily injury or death. Specifically, disability or loss of life in battle or military service from wounds,' etc.
>
> "Here, as to July 22, 1913, Brookins without fault, at home, resting, and preparing to take his trick at 11 P. M. was taken sick without fault on his

part and disabled. It was unforeseen and unexpected, and unusual. It happened and began to be without design. It was a fortuitous event. If this sickness was the result of some act of Brookins', as overeating, or eating impure food, or exposure, it was an event happening without the concurrence of his will, or that of the cook or any other person. The Century Dictionary says: 'Accident. In general, anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance. (2) Specifically an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap. In legal use, an accident is (a) an event happening without the concurrence of the will of the person by whose agency it was caused.' "

As said in *C. St. L. & N. O. Ry.* v. *Pullman,* 139 U. S., 79, 86, "An accident or casualty, according to common understanding, proceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly."

That the evidence presents a defense under other provisos of the Hours of Service Act save those submitted by the court we think may be assumed.

The defendant on the trial was entitled to an affirmative presentation on every defense that had evidence to sustain it. There are four provisos to the Act and it must be assumed that a definite meaning was intended for each of them, and that they did not mean the same thing. Indeed, such was the holding of the Circuit Court of Appeals, Seventh Circuit, in *United States* v. *Great Northern Ry. Co.,* 220 Fed., 630, 633, as follows:

"A consideration of the proviso will furnish a basis for determining the other assignments of error. If the view that was acted upon by the court throughout the trial is correct, namely, that 'casualty' means any occurrence or happening, whether unavoidable or avoidable by the exercise of due care on the part of the railroad, and therefore excuses

> all delays except those knowingly and willfully caused by the railroad, then it seems clear to us that Congress stands convicted of having followed up 'casualty' with a series of meaningless and purposeless expressions, but if the result can fairly be reached the courts must ascribe a meaning and a purpose to every part of a statute."

Whether the accident and consequent delay was an unavoidable accident, or the result of a cause not known to the carrier, or its officer or agent in charge of such employe at the time such employe left the terminal and which could not have been reasonably foreseen, were appropriate questions of fact which should have been submitted to the jury, unless of course defendant's evidence of exoneration was clear and undisputed, see:

M. K. & T. Ry. v. *United States*, 231 U. S., 112.
United States v. *Lehigh Valley R. Co.*, 219 Fed., 532.

Again, it appears from the printed record, page 57, that the Interstate Commerce Commission, under its Rule 88, adopted June 25, 1908, provided that "The provisions of this Act shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal and which could not have been foreseen. Any employe so delayed may, therefore, continue on duty to the terminal or end of the run. That proviso quoted removes the application of the law to that trip."

While the rules of the Interstate Commerce Commission may not have the force of law controlling in a case of this kind, yet same should be highly persuasive.

Pennell v. *P. & R. Ry. Co.*, 231 U. S., 675.

It was not the intent of Congress to make the railway companies insurers nor to exact from them practical impossibilities.

Northern Pac. Ry. Co. v. *U. S.*, 213 Fed., 163.
U. S. v. *Mo. Pac. Ry. Co.*, 213 Fed., 170.

III.

THE COURT ERRED IN DIRECTING THE JURY THAT PLAINTIFF MIGHT RECOVER IN ANY ONE OF FIVE CONTINGENCIES MENTIONED IGNORING THE QUESTION WHETHER IN ANY SUCH CASE THE ALLEGED NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE ACCIDENT OR INJURY, AND MOREOVER THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE SUBMISSION OF CERTAIN ALLEGED GROUNDS OF RECOVERY TO THE JURY.

The court charged the jury as follows:

> "If you believe from a preponderance of the evidence that there was negligence on the part of the defendant, either in giving the plaintiff's disabled engine the position which it occupied at the time of plaintiff's injury, or in the manner of the handling of the same by the engineer Artist at this time, or if you believe that there was negligence in placing the sill step inside of the rails or making it too narrow, or that there was negligence in allowing cinders (if any) to be caught on the sill step where plaintiff was standing; then in any one or more of such events the plaintiff may recover." (Pt. Rec., 58.)

This paragraph of the charge specifically instructed the jury that if they believed there was negligence with respect to any one of the five acts of negligence alleged by the plaintiff, he could recover without advising the jury that such act of negligence must have caused or contributed to the injury. For instance, under this paragraph, if the jury believed that placing the sill step inside of the rail, or making it too narrow, was negligence, they were required to find for the plaintiff although they

may not have believed that such negligence caused or contributed to this accident.

Again, if they believed there was negligence in allowing cinders, if any, to be caught on the sill step, where plaintiff was standing, although the defendant, or those operating some other train who might have dumped ashes from the fire pan upon the right of way (or were they dumped from an automatic fire pan or when?), could not have reasonably anticipated that it would have resulted in any such accident, yet the defendant under this instruction would be held liable and the jury were required to return a verdict for plaintiff.

The same suggestion applies with reference to the position in the train in which the disabled engine was placed although the plaintiff for some time prior to the accident knew of its position and as an experienced fireman knew that it was liable to be more or less jerked in the stoppage of the train as it approached the station. Although he might be held to have assumed that risk yet the jury were required to render a verdict against the defendant if they thought such act of the defendant was negligent.

Again, the engineer Artist necessarily applying air to stop the train as it approached the station had no reason to believe that the plaintiff or anyone else would place himself in a dangerous position upon the dead engine at the time.

It will be observed that proximate cause is not defined in any paragraph of the charge; so here we have a plain case where the trial court has informed the jury recovery could be had for a negligent act, atlhough such act had no connection with the injury, nor could such injury have been reasonably anticipated as likely to result therefrom.

For a recent lucid exposition of proximate cause, see *Chambers* v. *Everding*, 71 Ore., 521, 143 Pac., 616, 620, wherein it was said:

> "If the defendants had been guilty of negligence in leaving the logs propped on the hillside, they would not have been liable to the plaintiff for the injury to him, because they could not have foreseen or reasonably have anticipated that some one would put out fire, and that the fire would be blown by the wind upon their premises, and burn out the props, and cause the logs to roll down the hill, and injure some person. Their negligence under such condition of facts would have been too remote to be actionable. In *Cote* v. *German S. & L. Society*, 124 Fed., 115, 59 C. C. A., 595, 63 L. R. A., 416, the court says:
>
> 'An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable. Such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate cause of the injury.' "

The case of *Texas & Pacific Ry. Co.* v. *Bigham*, 90 Texas, 223; 38 S. W., 162, 163, was a suit for personal injuries, plaintiff alleging that he had placed some cattle in the stock pens of the railway company for shipment; that the gate which admitted entrance into the pen was out of repair, as the railway company knew. The appliances for fastening the gate were defective and it was found that this condition was due to the negligence of

the defendant company. In order to prevent the escape of the cattle, the plaintiff was in the act of fastening this gate with a rope when the noise of a passing freight train frightened the cattle so as to produce a panic. The cattle plunged towards and upon the gate, and before plaintiff could escape he was hurled to the ground from the violence of the contact. But for the defective condition of the gate the cattle would not have escaped. In passing upon the question at issue the court said:

> "The maxim that 'in law, the immediate, and not the remote, cause of any event, is regarded' applies to cases of negligence. The negligence must be the proximate cause of the injury. But the word 'proximate' is not happily used in that connection. In ordinary language a proximate cause is the nearest cause; but, in a legal sense, an act of negligence may be deemed a proximate cause of an injury, although it may not be the last cause in a connected succession of events which have led to a result. It is usually laid down, in cases of negligence, that, in order to constitute the proximate cause of an injury, the injury must be the natural and probable result of the negligent act or omission. Since every event is the result of a natural law, we apprehend the meaning is that the injury should be such as may probably happen as a consequence of the negligence, under the ordinary operation of natural laws. The rule is sometimes put upon the ground that to allow a recovery for injuries resulting from remote causes would lead to intolerable litigation, and this seems to be indicated in Bacon's paraphrase of the maxim quoted above: 'It were infinite for the law to consider the causes of causes and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking for any further degree.' But it seems to us that as applied to the law of negligence, at least, a better ground for the rule is that a party should not be held responsible for the consequences of an act which ought not reasonably to have been foreseen. In other words, it ought not to be deemed negligent to do or to fail to do an act when it was

not anticipated, and should not have been anticipated, that it would result in injury to anyone. To require this is to demand of human nature a degree of care incompatible with the prosecutions of the ordinary avocations of life. It would seem that there is neither a legal nor a moral obligation to guard against that which cannot be foreseen, and under such circumstances the duty of foresight should not be arbitrarily imputed."

After citing and discussing the case of *M. & St. P. Ry. Co.* v. *Kellogg,* 94 U. S., 469, the court continued:

"Ought the agents of the company to have foreseen, that as a result of the imperfect fastening of the gate, the injury, or any injuries similar in character, would probably result? In our opinion, nothing short of prophetic ken could have anticipated the happening of the combination of events which resulted in the injury to the person of the plaintiff. The act of the defendant in permitting the fastening to its gate to become insecure was in itself lawful; and, since it was clearly out of the range of reasonable probability that an injury to the person of anyone should result, it should be held, as a matter of law, that the negligence of the company gave no right of action for such injuries."

In *Wolosek* v. *Chicago & M. Electric Railway Company* (Supreme Court of Wisconsin, October 27, 1914), 158 Wis., 475, 149 N. W., 201, it is laid down:

"An instruction on proximate cause, omitting to charge that proximate causation necessarily includes the element of reasonable anticipation, and that an alleged negligent act cannot be held to be the proximate cause of an injury in a legal sense unless the person responsible in the light of the attending circumstances ought, in the exercise of reasonable care, to have foreseen that personal injury might result therefrom to another, was improper."

In *Kreigh* v. *Westinghouse, etc., Co.,* 152 Fed., 120, it was laid down by the Circuit Court of Appeals, Eighth Circuit, that an injury which could not have been foreseen or reasonably anticipated as the natural and prob-

able result of an act of negligence is not actionable because it is not the proximate cause, but either the remote cause or no cause whatever of the damage.

To the same effect is *Cole* v. *German Savings, etc., Society,* 124 Fed.. 113.

In *Stefanowski* v. *Chain Belt Co.,* 129 Wis., 484; 109 N. W., 532, after full examination of the question and quoting from a former decision, it was said:

> "Whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action."

See also:

Missouri Pacific Ry. Co. v. *Columbia,* 65 Kans., 390; 69 Pac., 338.

Cleghorn et al. v. *Thompson et al.,* 62 Kans., 727; 64 Pac., 605.

1 Sutherland on Damages, 3d Ed., Sec. 16.

1 Shear. & Red. on Negligence, 4th Ed., Sec. 28.

See also remarks of Judge Agnew in *Fleming* v. *Beck,* 48 Pa. St., 309, 313.

Hoag v. *L. S. & M. S. Railway Co.,* 85 Pa. St., 293.

The above principle was applied in *Morrison* v. *Davis & Co.,* 20 Pa. St., 171, 175, in which it appeared that on account of a negligent delay in the transportation of goods, they were subsequently overtaken and damaged by an act of God, and where it was said:

> "The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on

this account, be foreseen by ordinary forecast; and *not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature.*"

The ruling in that case was followed and applied in *Railroad Co.* v. *Reeves,* 10 Wall., 176.

See also:

C. St. P. M. & O. Ry. Co. v. *Elliott,* 55 Fed., 949, 952.

Scheffer v. *Railroad Co.,* 105 U. S., 249.

Glassey v. *Worcester Con. St. Ry. Co.,* 185 Mass., 315; 70 N. E., 199.

Stone v. *B. & A. R. R. Co.,* 171 Mass., 536; 51 N. E., 1.

A defendant charged with mere inadvertent negligence or thoughtless omission should only be held responsible for those results which might reasonably have been perceived by a man of ordinary intelligence and prudence. In such a case he could not be expected to anticipate that an unusual and unexpected situation might intervene to cause a damage which was rendered possible merely by reason of a condition brought about without design on his part to inflict injury. Neither could he well anticipate that some other party would recklessly and carelessly place himself in a dangerous position and thus jeopardize his own safety.

Here it appears from the evidence that plaintiff could have safely performed his duty without using the sill step, and there was no evidence that the sill step was placed there to be used for the purpose for which plaintiff used the same.

If the court had properly submitted the issue of proximate cause, the jury might well have found that the defendant could not reasonably have anticipated that an

injury to plaintiff would result from his attempting to use the sill step in the manner and under the circumstances existing when he made such effort.

Under a proper submission of proximate cause, the jury might well have found that the defendant could not reasonably have anticipated that plaintiff or anyone else would be injured on account of the position of the disabled engine in the train.

In connection with these questions it should be noted that while plaintiff's testimony tended to show that he was instructed by the engineer to do the oiling as the train was about to stop at some station, the giving of any such instruction was specifically denied by the engineer who testified (Pt. Rec., 46):

> "I made a statement to the plaintiff at Palmer Lake as to what he should do. I told him when the engine got to groaning and when they stopped to oil the cylinders through the indicator plug holes. I did not tell him to go out on the pilot to be ready to jump to oil it immediately upon stopping. I did not say anything with reference to being ready, 'out there' to oil it. I said. 'Be ready to oil it.' I never said to be ready 'to be out there.' I said when the engine got to groaning, and when they came to a stop to oil the cylinders through the indicator plug holes. I did not direct him to stand anywhere. I did not anticipate he would stand on the step in front of the pilot."

Plaintiff's evidence was also inconsistent with the written statement which he gave the defendant January 7, 1911, introduced as part of his case, as follows:

> "The engineer did not tell me that the oil would be put in while the engine was moving, but I went out expecting them to stop as they were very near stopped when I left the cab of the engine." (Pt. Rec., 57.)

Thus it abundantly appears that the jury might well have found, under a proper submission of the question,

that no one of the five acts of alleged negligence referred to in paragraph of the court's charge under consideration, was the proximate cause of plaintiff's injury, for the jury could well have concluded that the defendant could not reasonably have anticipated that plaintiff would be injured by any one of such alleged acts of negligence. Yet it is made liable for any one of these alleged acts, though it might be found that such one or more was not the proximate cause of the injury.

The evidence was conclusive that plaintiff assumed the risk of the position of the engine in the train and of the position and size of the sill step.

Prior to the accident plaintiff, of course, knew the position of the engine in the train; knew that as the train approached a station where it was to be stopped air would have to be applied and there would be more or less jerking of the cars together. He knew, therefore, when going out upon the sill in front of the engine to oil the same that he was taking an exceedingly hazardous position at the time. As an experienced fireman he would know there would be more or less jerking in the movement of a freight train and particularly in stopping the same.

He knew the situation, the liability of the dead engine to be jerked on the stoppage of the train, and the risk or danger of his attempt was obvious. He took the risk incident to that situation.

Seaboard Air Line R. Co. v. *Horton*, 233 U. S., 504, 505.

Kohn v. *McNulta*, 147 U. S., 238.

Southern Pac. Co. v. *Seley*, 152 U. S., 145.

As to the pile of ashes which may have been dumped from some previous train within the rails at some dis-

tance from the station, no one would have reason to suppose that they would get upon the sill of some disabled engine placed within the train so as to endanger anyone upon such engine.

Neither was there evidence raising any issue of negligence as to the position or size of the sill step. Plaintiff knew of the same prior to the accident. He testified as follows:

> "The jerk occurring at the time I was hurt was a pretty good jerk, a fierce jerk. The ashes and jerk threw me from the pilot sill step. I did not have any foothold on the step on account of the ashes and cinders. * * * I have seen other sill steps, and they were outside of the pilot beam. I do not know of a rule concerning the position at which sill steps should be placed. It is the government rule." (Pt. Rec., 31, 32.)
>
> "I do not know how fast the engine was running at the time, but it was making time between stations. I climbed around in the same way, but I did not get down on the step. I saw the step and saw that it was only 3½ or 4 or 5 inches from the rail. I knew all about the pilot and the little step of wood I spoke of; and when this engine moved into the sidetrack at the rate of 2½ or 3 miles per hour I climbed over the running board instead of on the ground to get to the front of the engine. * * * I did not stand on the platform, because I was told to stand at another place. I was within a step of the platform, but to get on it would not be complying with my orders." (Pt. Rec., 35, 36.)
>
> "I said there were no defects in the pilot itself. I said, 'There were no defects in the pilot that I know of that would cause me to fall,' but I had reference to the pilot itself; there was nothing broken about the pilot. Everything attached to the pilot is the pilot. The step is a part of the pilot. The statement that 'there were no defects on the pilot that I know of that would cause me to fall,' is right." (Pt. Rec., 37.)
>
> "I did not notice anything defective about the pilot." (Pt. Rec., 41.)

The evidence was wholly insufficient to submit certain grounds of alleged negligence to the jury.

In this connection, we submit that as to those acts growing out of the position of the sill step and its size, there was nothing to submit to the jury. It appeared without controversy that the sill step was inside the rails, but we fail to find any evidence to the effect that to so place it was an act of negligence. It was a permanent part of the engine, and for aught that appeared had always been in the same position it was at that time. We may assume that in this position it was a part of the original construction of the engine, and for the court to submit this as an act of negligence on which recovery was authorized, and particularly without regard to the question of proximate cause, was in fact a direction to find for the plaintiff.

The evidence was also insufficient to raise an issue of negligence in the engineer as to his manner of handling the train in approaching the station. Jerking of cars in the movement of a long freight train is not unusual, indeed is unavoidaable.

In *Griffin* v. *Springfield Street Ry. Co.*, 219 Mass., 55, 106 N. E., 551, 552, it was held that testimony in a suit instituted by a passenger that the car gave a terrible jerk, and that it was more than an ordinary jerk, without more, was not sufficient to raise an issue of negligence. The court said:

> "This testimony is almost in the same words as that held in *Craig* v. *Boston Elevated Railway*, 207 Mass., 548, 93 N. E., 575, not to entitle the plaintiff to go to a jury. If this was all there was to the plaintiff's case, she would be precluded from recovery by the authority of that decision.
>
> That case is illustrative of many which have come before this court where a plaintiff by the use of

violent descriptive epithets as to the nature of the starting of the car, together with testimony of injury, has sought to sustain his burden of proof. Uniformly it has been held that that is not enough. Anybody standing in an electric car is liable to be thrown off his balance and to fall as a result of such starts and jerks. Most of these cases are collected and reviewed in *McGann* v. *Boston Elev. Ry.*, 199 Mass., 446, 85 N. E., 570, 18 L. R. A. (N. S.), 506, 127 Am. St. Rep., 509; *Work* v. *Boston Elev. Ry.*, 207 Mass., 447, 93 N. E., 693, and *Martin* v. *Boston Elev. Ry.*, 216 Mass., 361, 103 N. E., 828."

Here the engineer in charge of the train testified with reference to the time of the accident:

> "In handling the train there I made a service application of the air the way I always handle the train." (Pt. Rec., 43.)

The evidence was wholly insufficient to justify a submission to the jury of any question of the engineer's alleged negligence in applying the air, which application was necessary to the stoppage of the train.

IV.

THE COURT ERRED IN INSTRUCTING THE JURY IN THIS CASE THAT IN RESPECT TO ALLEGATIONS AS TO ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE AND EXISTENCE OF A CASUALTY AND UNFORESEEABLE CAUSE THE BURDEN OF PROOF RESTED UPON THE DEFENDANT.

The instruction complained of in the seventh specification of error, and which was assigned in the lower court (Pt. Rec., 73) was erroneous and misleading in this case, particularly in view of plaintiff's own evidence.

While it is true that in the federal and some of the state courts the general rule is that in the absence of

an allegation by the plaintiff, or of a showing of contributory negligence in the evidence produced to sustain plaintiff's case, it devolves upon the defendant to allege and prove contributory negligence and assumption of risk and possibly that the delay to a train in reaching a terminal whereby an employe was held beyond sixteen hours was reasonably excusable where the latter fact was alleged and shown to be the proximate cause of the injury, yet it is pretty well settled and stands to reason that where evidence produced to support the plaintiff's case tends to show contributory negligence or assumption of risk the burden of proof necessarily shifts from defendant to the plaintiff because it becomes then incumbent upon the plaintiff to overcome the effect of his own showing. A presumption of care on his part then no longer exists. See:

Beach on Contributory Negligence, 3rd Ed., Secs. 427, 428.

A presumption of due care on the part of the party injured, in the absence of evidence to the contrary, might justify a ruling that he was not obliged to prove a negative. But where, from the plaintiff's own case, it should appear that he was guilty of contributory negligence or had assumed certain risks the presumption would be overcome and the court might instruct the jury to find for the defendant. Thus it is apparent that the general rule would not be applicable in such a case.

Neither would the burden be upon the defendant to show that the delay was from a cause which could not have been reasonably foreseen when the employe left upon his run unless plaintiff's evidence should show, and the jury should find, that the delay was the proximate cause of the accident or injury.

Now in the case at bar it is apparent from plaintiff's own testimony that he knew the location of the dead engine in the train, that it was likely to be jerked on the stoppage of the train, he knew the character and kind of sill step upon which he was standing and knew that the position he assumed was a dangerous one. It is also but fair to state that upon the witness stand he attempted to exaggerate, color and misconstrue the instructions of his engineer and that he was guilty of contributory negligence in attempting to oil the cylinders while standing on the step when the work could have been done with more safety by standing upon the platform, or even on the running board. It was manifestly unfair, therefore, in view of his own evidence, to impose upon the defendant the burden of proving these facts for under the instruction given the jury had the right to assume that the plaintiff's evidence did not, in the opinion of the court, tend to show the same.

While there was some other error in the instructions which might be pointed out, we believe the foregoing sufficiently shows that there was plain and prejudicial error in submitting the case to the jury, as was done by the trial court, and in refusing to give the instructions requested by the defendant. The verdict is so large as to justify the conclusion that the jury made no allowance or deduction on account of the contributory negligence of the plaintiff.

The Circuit Court of Appeals does not appear to have given much consideration to the case as no opinion was rendered which would show what questions, if any, were considered and disposed of by it.

From the foregoing we trust we have shown that the questions raised are worthy of consideration and careful disposition. We, therefore, submit that the judgment

of the Circuit Court of Appeals and of the District Court should be reversed.

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IN THE

Supreme Court of the United States

October Term, A. D. 1915.

No. 74

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Plaintiff in Error.

vs.

CLAUDE SWEARINGEN,

Defendant in Error.

Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

For convenience, the term plaintiff will in this brief designate Claude Swearingen, and the Railway Company will be called defendant.

The plaintiff testified to the following facts and his action was based thereon: He was a locomotive fireman for defendant;

he was on duty continuously from 7:40 P. M. to December 19th, 1910, to 1:25 P. M. on the next day, a period of seventeen hours and forty-five minutes. At the end of that period he was relieved from duty. He had lost his leg. (Tr., p. 31.) Seven or eight hours was schedule time for the trip that he was on. (Tr., p. 30.) The trip is 119 miles, and when they had been out 15 hours and covered about half the distance, the engine broke down. (Tr., p. 29, botton.) A valve yoke had broken because it was dry, there was no oil on it. (Tr., p. 30, top.) "The reason this engine took 15 hours in going half the distance to Denver" lay in the fact that the boiler had not been washed out and it foamed and they had to go slowly and stop all along the road. The foaming water continually washed the oil off the valves and finally caused the yoke to break. (Tr., pp. 41 and 42.) The engine was then absorbed by another freight train going to Denver, the engineer and fireman remaining in charge. (Tr., p. 30)

When the engineer and fireman had been on duty 16 hours, the engineer declared that the Federal time was up (Tr., p. 39 and p. 50, bottom), and left the engine and went into Denver on a passenger train, leaving plaintiff in charge of the engine with directions how to oil it. (Tr., p. 30.) "The engineer could have acted as messenger as well as I did. I had to agree to act as messenger under the orders. I did agree to act as messenger but I had to do so." (Tr., p. 40, top.) He was required by the engineer to act. (Tr., p. 33.)

When plaintiff had been on duty 17 hours and 45 minutes and the train was going into a siding, he attempted to oil the locomotive from the pilot. The position of plaintiff's engine in the train (Tr., p. 31, bottom), a jerk from the front engine (Tr., p. 31, middle, and 32, top), ashes on the track, insufficiency of the sill step on the pilot, and plaintiff's state of physical exhaustion from long hours of service, all contributed to his being

thrown from the pilot and injured. **"I did not have any foot hold on the step on account of the ashes and cinders. And I was so tired, sleepy and hungry I was not in physical condition to stay on easily."** (Tr., p. 32.) Plaintiff's testimony as to his exhaustion from working over-time was in no wise contradicted. It was undisputed.

The defendant pleaded contributory negligence and assumed risk and two of the four exceptions named in the proviso of said section two, namely: casualty and a cause unknown and unforeseeable at the time plaintiff left his terminal. (Tr., pp. 6, 7 and 17.)

BRIEF OF ARGUMENT.

We shall attempt to answer defendant's argument in the order of the Roman Numeral headings in its brief.

I.

The sixteen-hour law was enacted for the safety of employees. If a violation of this law contributes to the injury of an employee, the railroad is liable, and the defenses of contributory negligence and assumed risk are not available. The general law and the Employers' Liability Act forbid all argument on this proposition. The McWhirter case, 229 U. S., 265, from which defendant repeatedly quotes, fails to support the contention made in its brief. In that case the deceased worked five minutes over-time, but no proof whatever was offered as to the cause of his death. No causal connection between his working over-time and his death was shown. All was left to "surmise and conjecture." The only man who could have testified to such connection, if any there was, had been killed. No new rule of law was announced in that decision; the testimony simply failed to support the allegation of death caused by negligence.

Death was proved. Working over-time was proved. But no connection between the two was established.

In the case at bar the plaintiff had been on duty 17 hours and 45 minutes when he was injured. (Tr., p. 31.) He survived the accident and testified and his testimony was uncontroverted. He was out on the pilot to oil the engine as the train drifted into the siding. The train was about to stop when a pile of coal cinders was swept on the step and a sudden jerk of the train threw him from the step which was inside the rails. (Tr., p. 31.) "The ashes and jerk threw me from the pilot sill step. I did not have any foot hold on the step on account of the ashes and cinders. And I was so tired, sleepy and hungry I was not in physical condition to stay on easily." (Tr., p. 32.) "At the time the jerk came I was more dead than alive, I was sleepy, tired and hungry." (Tr., p. 31.) This last statement about his being hungry is followed by an objection. Then follows the testimony: "I got hurt at 1:25 in the afternoon on December 20th and I started at 7:40 on the evening of the 19th." The continuity between the testimony as to his being exhausted and the length of time he had been on duty seems to be broken by the objection. But a casual reading of the narrative statement of the testimony, by omitting the objection, will show that the questions and answers at the trial were to the effect that plainiff was more dead than alive, he was sleepy and tired after being on duty for 17 hours and 45 minutes, from 7:00 P. M. to 1:25 P. M. of the following day, and that he was thrown from the pilot because he was not in a physicial condition to stay on. His testimony was undisputed.

Nor did the trial court make liability depend merely on the working over-time. Throughout the charge negligence causing or contributing to the injury is made the basis of recovery. This appears from a consideration of the entire charge. In the opening sentence of the charge the jury are told that "plaintiff alleges

that he lost his leg **through** the negligence" of defendant, (Tr., p. 10); that is to say, the negligence of defendant caused his injury. Then the court proceeds:

> "He named several acts and omissions on the part of defendant and says that each of them constituted negligence **causing or contributing** to his injury **One of these** is that defendant required and permitted him to be on duty on an engine for a longer period than sixteen hours." (Tr., p. 10.)

In other words, the jury is more specifically told that plaintiff claims his being required to work over sixteen hours constituted negligence **causing or contributing** to his injury. This statement of the basis of plaintiff's cause of action was brought concisely to the jury's attention and demonstrates that the court in submitting the question of liability did not withhold from the jury the question of proximate cause of his injury.

And again, the court says (Tr., p. 11): "And further if the injuries of the plaintiff were the **result** of a mere accident **without fault or negligence on the part of the defendant,** then plaintiff cannot recover." This is only another way of stating that plaintiff can recover only if defendant was guilty of negligence causing or contributing to his injury.

And again the court charges in a later paragraph (Tr., p. 12):

> "If you find then from a consideration of all the evidence that the breaking of the valve yoke as pleaded by defendant was a casualty or unknown and unforeseeable cause, as provided by said Act of Congress, then you cannot find negligence in the **fact** that plaintiff was required to work more than sixteen hours, but you may look to **other facts** in evidence, if any, to determine whether defendant was guilty of **negligence causing or contributing** to plaintiff's injury."

As heretofore stated, the court had, in the opening paragraph of its charge, informed the jury that one of the acts of defendant alleged to constitute negligence causing or contributing to plaintiff's injuries, was a working over-time; and taking these two together, the clear and reasonable effect of this last language was that if the jury fail to find negligence causing or contributing to plaintiff's injuries in **one of the acts** of defendant, namely: in the **fact of working over-time** under the possibly extenuating circumstances of casualty or unknown and unforeseeable cause of delay, then they may look to **other facts** in evidence, if any, to determine whether the defendant was guilty of **negligence causing or contributing** to plaintiff's injuries.

Complaint is also made of the following part of the court's charge: "Passing for the moment the question of negligence in requiring plaintiff to work over sixteen hours, etc.," as it is claimed that the court meant to charge negligence per se. Whether or not there was negligence in requiring plaintiff to work for seventeen hours and forty-five minutes was, throughout the charge, left to the jury for their determination. These terms are clear. The plaintiff in error seems to contend that the court used the language, "Passing for the moment the negligence of defendant." But this is not what the court said. It was a question, and the question was left to the jury.

The language of the court, "If you find that the breaking of the valve yoke could have been guarded against, or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of his injury in requiring him to be on duty more than sixteen hours," is complained of as charging negligence per se. However, this identical language, under similar circumstances, was approved by this court in Grand Trunk Railway Co. vs. Ives, 144 U. S. 408, 418, and seems to have been literally embodied in the charge.

However, after all, we believe that the general language of the court in the McWhirter case fully supports the case at bar. There is no similiarity of testimony in that case and our case. In the former the record was absolutely silent on the question of causal connection. In our case, the undisputed testimony shows that plaintiff's long hours of service contributed to his falling from the pilot and the loss of his leg. The proof is of the very character suggested by Chief Justice White in the McWhirter case:

> "The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time, and the facts and circumstances connected with an accident might be of such character as to justify not only the conclusion of negligence but also the inference of proximate cause, etc."

No stronger case of proximate cause arising from the evidence could be presented than the record of this case discloses. After the valve yoke broke, the train was abandoned and the engine was picked up by another train. (Tr., p. 30.) The engineer remained on duty till his sixteen hours had expired. Then he quit the engine and got permission to go home on a passenger train. (Tr., p. 30.) He knew—and so delcared at the time—that they were dead, that is to say, the Federal time was up. (Tr., p. 31.) "I knew when my sixteen hours were up that I did not have to work any more." (Tr., p. 50.) Yet the fireman was required to continue with the engine until he was more dead than alive, until he was in no physicial condition to hold on. The evidence as to plaintiff's exhaustion from long hours of

service was undisputed. The inference of proximate cause was inevitable.

Del. L. & W. Ry. Co. vs. Converse, 139 U. S., 469, 472.

II.

Under heading II, defendant complains that two of its requested charges were not given and that these charges submitted issues that were ommitted from the court's general charge.

As stated on page 24 of defendant's brief, the contention as to the first charge, is as follows: "The charge only submitted casualty or unknown and unforeseeable cause, while the special charge which was refused also submitted the question of unavoidable accident."

Now, in its special defense, the defendant set up only (1) casualty and (2) a cause unknown to and unforeseeable by defendant at the time when plaintiff left the terminal. Unavoidable accident was not pleaded. The author of defendant's brief should have been aware of this fact. The requested charge, which defendant complains was refused, states in the opening paragraph (Tr., p. 63), that the defendant has pleaded that if plaintiff was worked over-time, then this was the result of (1) a casualty, namely: the breaking of the valve yoke, (2) from causes unknown to and unforeseeable by defendant at the time of departure from the terminal. In defendant's brief this requested charge is printed; but, probably by an oversight, this first paragraph is omitted. In the second paragraph the jury are instructed that if the delay arose either from (1) a casualty, (2) an unavoidable accident, or (3) an unknown and unforeseeable cause, the act would have no application. This charge was incorrect, as it named unavoidable accident, a defense that had not been pleaded. The four defenses named in the proviso are distinct; the defendant's confession and avoidance embraced only two of them. As stated in United States vs. Great Northern

Ry. Co., 220 Fed., 633, the four defenses have distinct meanings. Therefore they must be distinctly pleaded.

But aside from defendant's failure to plead unavoidable accident, the evidence does not show affirmatively a cause that human agency could not have controlled. On the contrary, the engine foamed and stopped still before the train got out of the yards of the terminal. (Tr., p. 41.) This condition continued all along the road. It was caused by a failure to wash out the boiler and finally resulted in the breaking of the valve yoke.

Plaintiff testified as follows:

"We were going slower than our regular speed because we were out of steam and the valve was hot and dry. The valve yoke is in the cylinder or steam chest. The valves were dry because the engine foamed and washed all the oil off the valve. The boiler will foam because it becomes full of dirt and scale. When it foams the water rises up with the steam and wet steam will go down in the steam chest aud out through the stack. That occurs when the boiler foams, and is caused by the boiler being dirty and needing washing out. I do not know how often a boiler should be washed out; but I think every three or four hundred miles. I made a trip on this same engine the day before, and the engine foamed on that trip. It seems to me it took fourteen or sixteen hours to make that trip; and the schedule time is seven or eight hours. On the trip on which I was hurt the engine foamed before we left the yards at Pueblo and we had to stop still. At that time the caboose was not yet out of the yards. We stopped because water went down in the cylinder instead of steam. That condition continued all along the road. Whenever the oil is washed off the valves, the valve becomes dry and hot and will break if that condition keeps up. The reason this engine took fifteen hours in going half the distance to Denver was because of the foaming and the condition of the

engine. The engine was dirty when we left the terminals. It had foamed on the previous trip and we had reported it washed out and they did not wash it out." (Tr, p. 41.)

And defendant's witness, the engineer who handled the engine, testified as follows:

"I was the engineer and I am the man who knows when the water needs treatment from the way the engine works; and if the fireman keeps on treating the water and the engine keeps on foaming it is something else besides the water that needs treatment. When we had gone about a train length and a half, or two train lengths out of Pueblo the engine started to foam and we stopped right there on account of the grade. I was standing right at the end of the yard when I started but I do not know how much of my train was still in the yards when I started, but some of it was. That was the first time we had to stop because the engine foamed. I did not tell the fireman to treat the water because we treated it before we left the round house; and there was no use to treat it because we had already put the required amount in for that tank of water." (Tr., p. 48.)

Again, at the bottom of page 48, he says:

"If an engine foams you will have wet steam, which means that the water rises with the steam and washes the oil off the valve yoke; and just as fast as you throw oil on the valve yoke the water will run in and wash it off; and that will make the yoke hot; but I do not know that it will cause the yoke to break. The yoke works between two surfaces, and if you have nothing there but water the yoke will expand with friction; and when it expands it will stick and break. This engine, 104, on the trip before foamed and delayed a passenger train."

Plaintiff's expert as to the cause of the valve yoke breaking, testified as follows:

"Bad water will cause a valve to break. What I mean by bad water is alkali water or water that has been in a boiler that has not been washed out. Such water causes wet steam and it washes the oil off the valves and there is no lubrication. That has happened to me more than once, and I have broken valve yokes. When an engine foams it is not because there is too much water in the boiler but because the water is dirty and full of alkali; and that water will go out with the steam, and your locomotive isn't made to work water. **Washing the boiler gets all the dirt and alkali out. If you have clean water in the boiler you will have good dry steam.** Dry steam is essential to the valve yoke as it will not take the oil off of the valve surface." (Tr., p. 53.)

Again, on page 54, the witness says:

"An engine is all right as long as the valves are lubricated."

And again, on page 55, he says:

"If an engineer has dirty water he need not break the engine if he uses proper care. He will have to use proper care with any kind of water or he will break something. It is just a question of care on the part of the engineer, even with dirty water, to keep from breaking the engine. If an engine is foaming that has been out on a trip for about ten hours, and the engineer has to blow off his boiler and could not make time and is delayed along the route and finally, between stations, the engine comes to a dead stop and the engineer goes down and disconnects one side and asks the fireman to work the reverse lever and he cannot budge it, I would say that the valves are stuck on account of lubrication or want of lubrication. The lubricator runs by steam and runs at the rate of three drops of oil per minute. The more oil that is put on anything the more it lubricates it."

The testimony all shows that care and foresight could have easily prevented this breaking of the valve yoke. The boiler

was dirty before the engine started out of the terminal. It was dirty on a previous trip and had been ordered washed out; but, according to plaintiff's testimony, the boiler was not washed out. The engine foamed before the caboose had gotten out of the terminal. As shown by the testimony of the engineers, this foaming would almost inevitably lead to the breaking of the valve yoke unless the engine was handled with great care. In other words, if oil had been constantly applied the yoke would not have broken although the engine did foam. Such testimony as this cannot be said to be sufficient to lead to the conclusion that the accident was inevitable. Nothing is inevitable that can be prevented by human foresight and care; therefore, there was no evidence, even if there had been a pleading, on which the question of inevitable accident could have been submitted to the jury.

Now, as to special charge number two: The general charge fully covered the matter. The court quoted the applicable sections of the Act, and then says: "The only question is: Was he required to work over sixteen hours on account of a casualty or a cause not known to and unforeseeable by defendant or its servants at the time he left Pueblo?" These are the first and the last of the four relieving circumstances named in the proviso, and the only ones pleaded by defendant. Then the court charges that if either of these existed, then there was no ngligence in working over-time; that is to say the Act did not apply. It covers the identical matter set out in this special charge number two. Its refusal was therefore proper.

Hartford Life Ins. Co. vs. Unsell, 144 U. S., 439, 447.
Erie R. R. Co. vs. Winter, 143 U. S., 60, 70, 75.

III.

Under heading III, two distinct propositions are made: (1) the court ignored proximate cause of plaintiff's injury and (2)

the evidence as to several issues of negligence was insufficient for submission to the jury. We shall argue the last first.

Without admitting the correctness of the latter proposition, we urge that no exception was taken to the action of the court in submitting the issue named. It is true, an objection was made that these issues of negligence were submitted regardless of their causal connection with plaintiff's fall from the pilot; but at no time was any exception taken to the charge on the ground that the evidence was insufficient to justify their submission. Defendant acquiesced in their submission and now, for the first time, complains in this Court. It should have objected to the submission of these issues in the trial court, or asked a charge directing the jury to disregard them. The rule of this Court is stated by Justice Lamar in the case of Grand Trunk Ry. Co. vs. Ives, 144 U. S., 408, 414:

> "But as the record fails to show that any exception was taken at the trial based upon a lack of any evidence in this particular, we repeat it is not properly presented to this court for consideration."

And the rule is again stated in Robinson & Co. vs. Belt, 187 U. S., 41, 50:

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record."

The sufficiency of the charge on proximate cause appears from a reading of the entire charge. We have discussed this under heading I. What is said there applies equally to the remaining grounds of negligence. The court informs the jury

that plaintiff assigns negligence, causing and contributing to his injury, in each of several named acts and omissions. If the jury find negligence in one or more of them plaintiff may recover; if in none, the jury will find for defendant. Defendant's brief ignores the language that follows this:

> "And further if the injuries of the plaintiff were the **result** of a mere accident **without fault or negligence** on the part of the defendant then the plaintiff cannot recover."

In other words, if the plaintiff's injury resulted without defendant's negligence he cannot recover.

And later in the charge, the court again reminds the jury that if they find no negligence in the working over-time, they may look to other facts in evidence, if any, to determine whether defendant was guilty of negligence causing or contributing to his injury. Taking the charge as a whole, it will appear readily that the court did not ignore the question of proximate cause.

IV.

Under this heading, defendant complains of the charge which places on it the burden of proof as to the defenses of contributory negligence, assumed risk, and the relief of the proviso. The specifications of error filed in this Court did not voice this complaint. (Tr., p. 90.) It seems to have been an afterthought. However, as it was brought to the attention of the trial court, and the question was raised there, we will answer it by citing the following cases:

I. & St. L. R. R. vs. Horst, 93 U. S., 291, 298.
Washington & G. R. Co. vs. Harmon, 147 U. S., 571, 580.

Both of these decisions show the rule of this Court to be

adverse to the contention made by defendant under this heading, and would seem to be conclusive.

We request an affirmance of the judgment.

Respectfully submitted,

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Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, **Petitioner,**

vs.

CLAUDE SWEARINGEN, **Respondent.**

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of said Court:

Here are the facts that distinguish this case from the McWhirter case: At the time respondent lost his leg, he had been on duty for 17 hours and 45 minutes. (R., p. 38.) He was sleepy and tired. "He was not in physical condition to hold on easily when he was thrown from the pilot." "He was more dead than alive." (R., p. 38.)

McWhirter also worked overtime; but no proof was offered as to the cause of his death.

The above statement would not be offered but for the fact that the petition for the writ wholly ignores that part of the testimony in the record which shows the causal relation between the lost leg and the working overtime.

Respectfully submitted,

S. ENGELKING,

C. P. JOHNSON,

Attorneys for Respondent.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* SWEARINGEN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 74. Argued November 11, 1915.—Decided December 13, 1915.

Under the Employers' Liability Act of 1908, a breach of the Hours of Service Act on the part of the carrier does not operate to deprive it of the defenses of contributory negligence and assumption of risk unless the breach contributed to the injury.

THE facts, which involve the construction and application of the Hours of Service Act, are stated in the opinion.

Mr. Robert Dunlap, with whom *Mr. Gardiner Lathrop*, *Mr. J. W. Terry* and *Mr. A. H. Culwell* were on the brief, for plaintiff in error:

Violation of the Hours of Service Act is not negligence *per se* destroying defenses of assumed risk and contributory negligence regardless of whether or not it was the proximate cause. *St. Louis &c. Ry.* v. *McWhirter*, 229 U. S. 265; *Nitro-Glycerine Case*, 15 Wall. on p. 537.

A party charging negligence as a ground of action must prove it. Such fact is not to be solved by indulging in surmise or conjecture, or resorting to imaginary possibilities. *Puget Sound Co.* v. *Hunt*, 223 Fed. Rep. 952, 955; 29 Cyc. 600; *Missouri &c. Ry.* v. *Foreman*, 174 Fed. Rep. 377.

To enable plaintiff to recover there must be proof that the cause which operated to produce the death had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable. See *Midland R. R.* v. *Fulgham*, 181 Fed. Rep. 91, 95; *Felt* v. *Boston & M. R. R.*, 161 Massachusetts, 311; 37 N. E. Rep. 375; *Hannigan* v. *Lehigh R. R.*, 157 N. Y. 244.

The special charge requested by plaintiff in error as to the Hours of Service Act as foundation for recovery should have been given to the jury, as the charge of the court did not comprehend all of relieving clauses contained in the proviso of the act and on which evidence was offered. *Southern Pacific Co.* v. *Pool*, 160 U. S. 438; *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 369; *United States* v. *New York, O. & W. Ry.*, 216 Fed. Rep. 702; *C., St. L. & N. O.* v. *Pullman*, 139 U. S. 79, 86; *United States* v. *Great Northern Ry.*, 220 Fed. Rep. 630, 633; *M., K. & T. Ry.* v. *United States*, 231 U. S. 112; *United States* v. *Lehigh Valley R. R.*, 219 Fed. Rep. 532; *Pennell* v. *P. & R. Ry.*, 231 U. S. 675.

It was not the intent of Congress to make railway companies insurers nor to exact from them practical impossibilities. *Northern Pac. Ry.* v. *United States*, 213 Fed. Rep. 163; *United States* v. *Mo. Pac. Ry.*, 213 Fed. Rep. 170.

The court erred in directing the jury that plaintiff might recover in any one of five contingencies mentioned ignoring the question whether in any such case the alleged negligence was the proximate cause of the accident or injury, and moreover the evidence was insufficient to justify the submission of certain alleged grounds of recovery to the jury. *Chambers* v. *Everding*, 71 Oregon, 521; 143 Pac. Rep. 616; *Tex. & Pac. Ry.* v. *Bigham*, 90 Texas, 223; *M. & St. P. Ry.* v. *Kellogg*, 94 U. S. 469; *Wolosek* v. *Chicago & M. Electric Ry.*, 158 Wisconsin, 475; *Kreigh* v. *Westinghouse Co.*, 152 Fed. Rep. 120; *Cole* v. *German Savings Society*, 124 Fed. Rep. 113; *Stefanowski* v. *Chain Belt Co.*, 129 Wisconsin, 484; *Missouri Pacific Ry.* v. *Columbia*, 65 Kansas, 390; 69 Pac. Rep. 338; *Cleghorn* v. *Thompson*, 62 Kansas, 727; 1 Sutherland on Damages, 3d ed., § 16; 1 Shear. & Red. on Negligence, 4th ed., § 28; *Fleming* v. *Beck*, 48 Pa. St. 309, 313; *Hoag* v. *L. S. & M. S. Railway*, 85 Pa. St. 293; *Morrison* v. *Davis*, 20 Pa. St. 171, 175; *Railroad Co.* v. *Reeves*, 10 Wall, 176; see also *C., St. P. M. & O. Ry.* v. *Elliott*, 55 Fed. Rep. 949, 952; *Scheffer* v. *Railroad Co.*, 105 U. S. 249; *Glassey* v. *Worcester Con. St. Ry.*, 185 Massachusetts, 315; *Stone* v. *B. & A. R. R.*, 171 Massachusetts, 536.

The evidence was conclusive that plaintiff assumed the risk of the position of the engine and position and size of the sill step. *Seaboard Air Line* v. *Horton*, 233 U. S. 504; *Kohn* v. *McNulta*, 147 U. S. 238; *So. Pac. Co.* v. *Seley*, 152 U. S. 145.

The evidence was wholly insufficient to submit certain grounds of alleged negligence to the jury and as to burden of proof. *Griffin* v. *Springfield Street Ry.*, 219 Massachusetts, 55; Beach on Cont. Neg., 3d ed., §§ 427, 428.

Mr. Perry J. Lewis, Mr. C. P. Johnson and *Mr. S. Elgelking*, for defendant in error submitted:

The sixteen-hour law was enacted for the safety of employés; if its violation contributes to the injury, the railroad is liable, and the defenses of contributory negligence and assumed risk are not available. The general law and the Employers' Liability Act forbid all argument on this proposition. The *McWhirter Case*, 229 U. S. 265, fails to support the contention of plaintiff in error; but does support the decision of the court below.

Plaintiff had been on duty nearly eighteen hours when he was injured; the testimony shows he was more dead than alive: he was sleepy and tired after being on duty from 7.00 P. M. to 1.25 P. M. the next day; in fact, he was thrown from the pilot because he was not in a physical condition to stay on.

The trial court did not make liability depend merely on the working overtime. Throughout the charge negligence causing or contributing to the injury is made the basis of recovery. *Grand Trunk Ry.* v. *Ives*, 144 U. S. 408.

No stronger case of proximate cause arising from the evidence could be presented than in this case. *Del., L. & W. Ry.* v. *Converse*, 139 U. S. 469, 472.

In support of contention of defendant in error as to proximate cause and assumption of risk, see also *Hartford Life Ins. Co.* v. *Unsell*, 144 U. S. 439, 447; *Erie R. R.* v. *Winter*, 143 U. S. 60, 70; *Robinson* v. *Belt*, 187 U. S. 41; *I. & St. L. R. R.* v. *Horst*, 93 U. S. 291, 298; *Washington & G. R. R.* v. *Harmon*, 147 U. S. 571, 580.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit for personal injuries suffered by the plaintiff (defendant in error,) while acting as fireman upon and in charge of a defective engine that had been picked up by a train. He had been kept on duty for more than

sixteen hours, and, as we take it for present purposes, contrary to the act of March 4, 1907, c. 2939, § 2, 34 Stat. 1415, 1416, without the justifications or excuses allowed in § 3. While about to do some oiling according to directions, he fell from the running board of the pilot and his leg was cut off. There was evidence of negligence on the part of the Railroad but the defendant set up that the plaintiff was guilty of contributory negligence and assumed the risk. The only matter that we have to consider here is an instruction given to the jury touching the effect of keeping the plaintiff on duty overtime upon these matters alleged by the defence.

The delay that led to keeping the plaintiff on duty too long was caused by the breaking of a valve yoke, and a part of the charge was as follows: "If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt."

The last half of this instruction was excepted to in the presence of the jury, but the charge was not modified. It was the one instruction specifically directed to the mat-

ter of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than sixteen hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defences of contributory negligence and assumption of risk in such a case is not the Hours of Labor Act itself but the subsequent Employers' Liability Act of April 22, 1908, c. 149, §§ 3, 4; 35 Stat. 65, 66. The latter has that operation only when the breach of the law contributes to the injury. *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 265, 279, 280. We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case.

Judgment reversed.

MR. JUSTICE DAY and MR. JUSTICE PITNEY dissent.